1

Court of Appeals
ND CIRCUIT.

RAILROAD COMPANY,

Libellant-Appellant,

E," her engines, etc., LA
TRANSATLANTIQUE,

Claimant-Appellant.

OF RECORD

OF THE UNITED STATES FOR
OF NEW YORK.

ION OF THE CLERK.

X

76

B. & O. R. R. Co. vs

Cases & Briefs

X

SEP 21 1909 WILLIAM PARKIN

United States Circuit Court of Appeals
FOR THE SECOND CIRCUIT.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Libellant-Appellant,

vs.

The Steamship "LA BRETAGNE," her engines, etc., LA COMPAGNIE GENERALE TRANSATLANTIQUE,

Claimant-Appellant.

TRANSCRIPT OF RECORD

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PRINTED UNDER THE DIRECTION OF THE CLERK.

FILED SEP 21 1909

INDEX.

	PAGE.
Statement	1
Libel	2
Answer	6

Before Hon. GEORGE B. ADAMS, *D. J.*

TESTIMONY FOR LIBELLANT.

(In Open Court.)

Edward G. Clarke (Master steamtug *Narragansett*),	
Direct	11
Cross	22
Re-direct	24
Michael J. Coleman (Capt of tug *Tice*),	
Direct	27
Edward Knott (Capt. tug *Overbrook*),	
Direct	30
Cross	35
Re-direct	36
John B. Roberts (Master tug *Independent*),	
Direct	36
Cross	39
Re-direct	41
Re-cross	41
John B. Roberts, recalled,	
Direct	49
Charles Gallagher (Master tug *N. Y. Central No. 10*),	
Direct	43
Chas. A. Day (Master tug *Chas. Runyon*),	
Direct	45
Cross	48
Thomas B. Mullen (Floatman on *Narragansett*),	
Direct	50

TESTIMONY FOR CLAIMANT.

(In Open Court.)

Michael Sullivan (Pilot on *La Bretagne*),
Direct 52
Cross 61
Re-direct 85
Eugene Poncelet (Master S. S. *La Bretagne*),
Direct 86
Cross 91
Re-direct 124

(Depositions.)

Louis Roch (3rd Lieutenant *La Bretagne*),
Direct 131
Cross 138
Yves Morise (Chief Quatermaster *La Bretagne*),
Direct 149
Cross 151
Re-direct 156
Re-cross 159
Joseph Le Guillou, (Quartermaster *La Bretagne*),
Direct 163
Cross 165
Mathurin Le Louarn (Seaman *La Bretagne*),
Direct 173
Cross 174
Re-direct 178
Yves Morise (Chief Quartermaster *La Bretagne*), taken on board S/S
Direct 179

TESTIMONY FOR LIBELLANT IN REBUTTAL.

Harris Morris (Mechanical Draughtsman, B. & O.), Co.
Direct 126
Edward G. Clarke,
Direct 127

Claimant's Ex. A. Diagram..... 181
Claimant's Ex. B. Diagram..... 182
Claimant's Ex. C. Diagram..... 183
Copy pilot's report of collision..... 184
Copy Master's (*La Bretagne*) collision 184

Opinion, ADAMS, *J*..... 191
Final Decree 199
Claimant's Notice of Appeal..... 202
Assignment of Errors..... 204
Libellant's Notice of Appeal..... 206
Assignment of Errors..... 207
Stipulation as to Record on Appeal.... 209
Clerk's Certificate..... 210

United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

BALTIMORE & OHIO RAILROAD COMPANY,
Libellant-Appellant,

vs.

The S/S. "LA BRETAGNE," her engines, etc., La Compagnie Generale Transatlantique,
Claimant-Appellant.

STATEMENT.

1904.
Dec. 9. Libel filed.
1905.
April 25. Answer filed.
1906.
May 7. Cause tried before Hon. Geo. B. Adams, *D. J.*
Oct. 30. Cause decided. Decree for libellant for half damages and order of reference.

1907.
Dec. 21. Final decree entered.
1908.
Feb. 8. Claimant's notice of appeal filed.
" " Assignment of errors filed.
1909.
July 3. Libellant's notice of appeal filed.
Assignment of errors filed.

5 To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Libel of the Baltimore & Ohio Railroad Company on its own behalf and as bailee on behalf of the owners of the cars and cargo transported on board its float *B. & O. 160 N,* hereinafter mentioned, against the steamship *La Bretagne,* her engines, boilers, tackle, apparel and furniture, in a cause of collision, civil and mari-
6 time, propounds and articulates as follows:

First.—That at all the times hereinafter mentioned the libelant was and is a corporation duly organized under and by virtue of the laws of the State of Maryland, and at such times was and is a common carrier of passengers and cargo for hire, and in its said business as common carrier owned, used and operated numerous tugs, barges, floats and cars, including among the tugs, floats and cars so owned and operated the steamtug *Narra-*
7 *gansett* and the floats *B. & O. 165 N* and *No. 67,* and nine of the fourteen cars laden on said float *B. & O. 160 N* at the times hereinafter mentioned.

Second.—The steamship *La Bretagne* is now within this port and within the jurisdiction of this Honorable Court.

Third.—At about 10 A. M. on the morning of the 17th of March, 1904, the steamtug *Narragan-*
8 *sett,* towing float *B. & O. 160 N* lashed to her starboard side, and float *No. 67,* lashed to her port side, left St. George, Staten Island, in the harbor of New York, bound for Pier 22, North River. Said float *B. & O. 160 N,* at said time, was carrying fourteen loaded cars and float *No. 67* eight loaded cars.

While bound on the course aforesaid and in the vicinity of Oyster Island Buoy No. 15, the steamship *La Bretagne* was noticed coming down

the bay bound for sea on a course to the eastward 9
of the position of said tug and tow and bearing slightly on the starboard bow of the *Narragansett*. The relative courses of the vessels aforesaid were maintained until they were about three ship-lengths apart, when the steamship *La Bretagne* negligently and wrongfully blew a signal of one blast and began to swing under a port wheel. Said maneuver exposed the tug *Narragansett* and her heavy tow to imminent peril, and a danger signal was immediately sounded by the tug *Narragan-* 10
sett and her engines reversed full speed. Notwithstanding these maneuvers the steamer came on with undiminished speed and struck float *B. & O. 160 N* a violent blow on her starboard side about one hundred feet from the bow, breaking her planking and seriously injuring her hull and causing her to sink to the water's edge, together with her cargo aforesaid, and by the severity of the shock causing many of her cars to jump from the rails and go overboard. The lines connecting 11
the tug *Narragansett* and said float were also broken by the collision and the services of outside salvors became necessary in order to rescue float *B. & O. 160 N* and her cargo from serious loss.

FOURTH.—The disaster aforesaid was not due to any fault on the part of the tug *Narragansett*, or those in charge of her; but was due solely to the fault and negligence on the part of those in charge of and navigating the steamship *La Bretagne*, in the following particulars: 12

1. In not maintaining a vigilant lookout.

2. In proceeding at too high a speed and in not seasonably slowing, stopping or reversing.

3. In not continuing on a course calculated to carry the vessels safely past each other starboard to starboard, and in attempting to cross the bow of the tug *Narragansett* when the vessels were too close together to permit said maneuver to be safely made.

13 4. In not taking seasonable measures by the use of her whistle or otherwise, to pass the tug *Narragansett* and her tow in safety, and not seasonably indicating her intention of porting her wheel and passing to the westward of the *Narragansett.*

5. In other respects to be shown upon the trial.

Fifth.—By reason of the premises, the libelant has incurred heavy expenses in salving, raising, towing and surveying its said float, cars and
14 the contents thereof, and in salving, raising, transporting and surveying other cars and the contents thereof in libelant's possession as carrier or bailee, and the said float and all of the aforesaid cars and the contents thereof have been seriously damaged and depreciated in value, and the libelant has lost the use of said float and cars during the periods of their respective repairs, and has also incurred considerable expense and liability for salvage services, all to its loss and
15 damage in the sum of $30,000; no part of which has been paid, although duly demanded.

Sixth.—All and singular the premises of the libel are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libelant prays that process in due form of law may issue against the steamship *La Bretagne,* her engines, boilers, tackle, apparel and furniture, and that all persons having or claiming to have any interest therein may be cited
16 to appear and answer all and singular the matters aforesaid, and that this court will be pleased to award to the libelant its damages as aforesaid, with interest and costs, and that the steamship *La Bretagne,* her engines, boilers, tackle, apparel and furniture may be condemned and sold to pay the same, and that the libelant may have such other and further relief in the premises as it may be entitled to receive.

Butler, Notman, Joline & Mynderse,
Proctors for Libelant.

State of New York,
County of New York, } ss.: 17

E. M. Devereux, being duly sworn deposes and says that he is an officer, to-wit, the assistant Treasurer of the Baltimore & Ohio Railroad Company, the libelant herein; that he has read the foregoing libel and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

E. M. Devereux. 18

Sworn to before me this
28, day of Nov. 1904.

A. M. Menkel,
[seal] Notary Public,
Westchester County.

Cert. filed in N. Y. Co.

Please to take notice that a libel of which the foregoing is a copy was this day duly filed in the office of the clerk of this court. 19

Dated, New York, Dec. 9, 1904.

Yours, &c.,
Butler, Notman, Joline & Mynderse,
Proctors for Libellants,
Office and Post Office Address,
Number 54 Wall Street,
New York City.

To Edward K. Jones, Esq.,
Proctor for Claimant. 20

[Endorsed:]—Libel.—Filed December 9, 1904.

21 To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of La Compagnie Generale Transatlantique, the owner and claimant of the steamship *La Bretagne,* to the libel exhibited by the Baltimore & Ohio Railroad Company against the above-named steamship *La Bretagne,* her engines, boilers, tackle, apparel, and furniture, in a cause of collision, civil and maritime, alleges and articu-
22 lately propounds as follows:

First.—The claimant has no knowledge or information with respect to the allegations contained in the first article of the libel, and, therefore, leaves the libelant to make such proof touching and concerning the same as it may be advised.

Second.—The claimant admits the allegations contained in the second article of the libel.

23 Third.—The claimant has no knowledge or information as to whether or not at about 10 A. M. on the morning of the 17th of March, 1904, the steamtug *Narragansett* towing float *B. & O. 160 N,* lashed to her starboard side, and float *No. 67,* lashed to her port side, left St. George, Staten Island, in the harbor of New York, bound for Pier 22 North River, or whether said float *B. & O. 160 N,* at said time was carrying fourteen loaded cars, and float *No. 67* eight loaded cars, as alleged in
24 the third article of the libel, and, therefore, leaves the libelant to make such proof touching and concerning the same as it may be advised.

The claimant denies each and every other allegation contained in the third article of the libel.

Fourth.—The claimant denies that the collision was due to the fault and negligence of those in charge of the navigation of *La Bretagne,* as alleged in the fourth article of the libel, but alleges

that the collision was caused solely by the negligence and carelessness, and violation of positive law of those in charge of the navigation of the *Narragansett,* by reason of the following facts: 25

At ten o'clock in the morning of the 17th day of March, 1904, *La Bretagne* left her pier at the foot of Morton Street, North River, in the City of New York, with a cargo of merchandise, and a number of first, second, and third class passengers, bound on one of her regular voyages to Havre, France, and that after hauling out into the stream she 26 turned and straightened on her course down the river towards Sandy Hook. The weather was clear and the tide was ebb.

La Bretagne's navigation was under the direction of a duly licensed pilot, stationed on the bridge, with her commander, a full corps of officers and quartermasters, and a number of able seamen on duty, properly stationed, and all attentive to their respective duties. In these conditions *La Bretagne* proceeded down the channel without 27 special incident or event until she neared the Statue of Liberty, keeping at that point to the right of the channel, close to the Five Metre Shoals, her course being S. S. W. true, and in accordance with the direction of the channel.

Thus proceeding, those in charge of the navigation of *La Bretagne* perceived, about three-quarters of a mile ahead of her, and about one-half a point on her port hand, a tug having in tow two carfloats, one lashed on each side of her, loaded 28 with freight cars, which tug and floats afterwards proved to be, respectively, the tug *Narragansett,* float *B. & O. No. 160 N,* and Float *No. 67. La Bretagne* at this time was proceeding at half speed.

Immediately upon perceiving the tow, *La Bretagne* gave a signal of one blast to indicate to the tow that *La Bretagne* would pass on the port side of the tow. *La Bretagne* then went to the starboard a few degrees. *La Bretagne's* signal was not answered by the tug.

29 When the vessels were about twelve hundred feet apart the tug changed her course across the course of *La Bretagne,* whereupon the pilot of *La Bretagne* ordered the engines slowed and gave another blast of her whistle, and swung the ship further to starboard. The tug, without answering the signal of *La Bretagne,* proceeded across the course of *La Bretagne,* whereupon *La Bretagne* reversed her engines full speed astern, and also gave the alarm signal, but before the
30 speed of *La Bretagne* was sufficiently arrested to avoid collision, the vessels collided.

After the collision *La Bretagne* stopped her engines, and the pilot having given several short blasts of the siren, numerous tow boats hastened to *La Bretagne,* who took in tow the floats and cars. *La Bretagne,* after having made an examination to determine whether she had sustained any injuries, and finding that she could safely go to sea, proceeded on her voyage.

31 The said collision was in no wise due to the fault, inattention or negligence of *La Bretagne,* or those in charge of her navigation, but was caused solely by the fault, omission and negligence of those in charge of the navigation of the *Narragansett,* in that:

1. She did not have and maintain a proper lookout, and those in charge of her navigation did not see, or if they saw *La Bretagne,* did not take timely precautions to avoid the collision.

32

2. She wrongfully attempted to cross the bows of *La Bretagne,* when it was apparent that she could not do so prudently and with safety.

3. She omitted and failed to seasonably turn to her starboard as she could have done, but on the contrary continued a course which crossed the course of *La Bretagne,* and crowded the latter in the channel.

4. She wrongfully refused to yield to *La Bretagne,* and persisted in crowding the latter in her efforts to pass along the starboard side of channel in safety. 33

5. She wrongfully omitted to timely slacken her speed and stop and reverse, as she was required to do by law, when risk of collision appeared.

6. She was otherwise in fault in particulars to be hereafter shown on the trial of this cause. 34

Fifth.—The claimant denies the allegations contained in the fifth article of the libel.

Sixth.—The claimant denies the allegations contained in the Sixth article of the libel, except that it admits that the cause is within the admiralty and maritime jurisdiction of this Court.

Seventh.—That all and singular the premises are true. 35

Wherefore, the claimant prays that the libel herein be dismissed with costs.

Edward K. Jones,
Proctor and Advocate for Claimant.

36

37 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

OSCAR R. CAUCHOIS, being sworn, says: That he is the Assistant General Agent for the United States and Canada for La Campagnie Generale Transatlantique, owner and claimant of the steamship *La Bretagne,* her engines, &c.; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best knowledge, information and belief of the deponent; that the said claimant is a corporation of the Republic of France, and that no officer thereof is within the jurisdiction of this Court, and that deponent is duly authorized to make the within answer and generally to make any and all answers, claims, declarations, verifications and acts for the said company in the premises that may be necessary for the protection of its interests herein.

38

OSCAR R. CAUCHOIS.

39 Sworn to before me this 26th }
day of April, 1905. }

JOSEPH P. NOLAN,
[SEAL] Notary Public,
N. Y. Co.

[Endorsed:]—Answer.—Filed, April 29, 1905.

40

Edward G. Clarke. 41

Before Hon. GEORGE B. ADAMS,

NEW YORK, May 7, 1906.

APPEARANCES:

MESSRS. BUTLER, NOTMAN & MYNDERSE (Mr. Brown and Mr. Menkel), for the libelant.

EDWARD K. JONES, Esq., and MR. NOLAN, for the claimant. 42

The allegations of the libel and answer are stated.

EDWARD G. CLARKE, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Brown:

Q. What is your business? A. Steamboat pilot and captain.

Q. You have been such how long? A. About 43 twenty-three or twenty-four years.

Q. What license do you hold? A. Master's.

Q. How long have you held that? A. Probably twenty or twenty-one years.

Q. In whose employ are you? A. The Baltimore & Ohio Railroad.

Q. How long have you been in their employ? A. About thirteen or fourteen years.

Q. Were you in command of the tug *Narragansett* on the day of the collision? A. I was. 44

Q. What composed her crew at that time? A. Eight men.

Q. What were their positions? A. There was the captain, mate, deckhand, and float captain, in the deck department, and then the engineer, oiler and fireman in the engine department, and there was the steward.

Q. What service was your tug engaged in at the time of the collision? A. Towing two carfloats from Staten Island to New York.

Q. Where had you left? A. We had left St. George, Staten Island.

Q. What were the dimensions of your tug? A. She was about 95 feet long, 22 feet beam, something like that, and 9 feet hold.

Q. What was her speed, light? A. Her speed light was, I should think, about ten knots.

Q. What were you making prior to the collision? A. With the tow I should think we were going about five miles an hour; I wouldn't say knots.

Q. Which tow had you in tow? A. We had float *67* and *160*.

Q. Which on which side? A. *160* on the starboard side and *67* on the port.

Q. How were they loaded? A. *67* was loaded with eight cars and *160* with 14 cars.

Q. What was the size of the floats? A. Approximately, *67* was about 200, or 210 feet long, or something like, and *160* was in the neighborhood of 300 feet long; they are both about 34 feet beam.

Q. How did the top of the cars that day compare with the elevation of your head, as you stood in the pilothouse? A. I could see over both floats plainly; I could see the horizon without any trouble.

Q. How much higher did you stand than the top of the cars? A. About 12 inches.

Q. Did you have any trouble in seeing objects around you? A. No, sir.

Q. Were the cars loaded, or light? A. The cars were all loaded, on both floats.

Q. As you came up the bay what was your course? A. My course at the time of the collision was N.E. by N; that is, we were steering that course.

Q. In what part of the harbor were you laying your course? A. We were passing abreast of Buoy 15, or Oyster Avenue Buoy, as I call it.

Q. Do you remember, up to that time, what part of the channel you had been laying your course in? A. On the edge of the anchorage grounds, getting all the slack water that we could; it was the last of the flood tide.

Q. What anchorage grounds? A. The anchor- 50
age grounds to the west of the channel.

Q. Were you following along that edge, or diverging? A. We were following along the westerly edge of the channel.

Q. What were the conditions existing, at the time of the collision and prior thereto, as regards tide, wind, and weather? A. It was a clear day, and what wind there was was about S. S.W., and the tide was about slack; we were in that position, saving all the slack water we could across the bay; 51
previous to that——

Q. Is there any custom——

THE COURT: Wait a minute; he was going to say something. Previous to what?

THE WITNESS: It was high water slack—

THE COURT: You said previous to something; what were you going to say?

THE WITNESS: I suppose, previous to the collision.

52

Q. Is there any custom in this harbor, so far as you know, as to the kind of course that vessels with tows, bound up the harbor, will take on an ebb tide?

Objected to.

Objection sustained.

MR. BROWN: One of the rules of navigation is that nothing in these rules contained

shall prevent a vessel following the ordinary dictates of prudence or general precaution rule, under which rule it has been practised by this Court always, to admit evidence of custom, and then decide what effect should be given to it.

MR. JONES: You can't introduce evidence of a custom to vary a statute, and the provision of the last international rule, as I now recall it, is that nothing in these rules shall oblige a party to depart from them except to avoid immediate danger; that is all; but the rules are made for the needs of navigators.

MR. BROWN: That is Article 27 that Mr. Jones refers to.

MR. JONES: There can be no proof of a custom to vary a statute, because the Legislature has prescribed a rule, and have prescribed it in the face of their knowledge of the conditions of things existing.

(Rule read to the Court.)

MR. BROWN: Under Article 29 the express language of the rule requires the courts to take account of the ordinary practise of seamen. It is that ordinary practise that I now propose to prove. Mr. Jones' claim proceeds from the narrow channel rule. In order to take the view that Mr. Jones urges it is necessary, first, to find that this was a narrow channel, and in reaching any conclusion of that, the question of the practise of seamen enters, and it is necessary to construe it.

THE COURT: As I understand, you want to introduce evidence to show that this pilot was justified in taking his tow along the left hand side of the channel.

MR. BROWN: I do.

THE COURT: I don't think I will take any evidence on that; it is a question of law.

MR. BROWN: But I think your Honor ought to have the custom, in order to know what the law is.

THE COURT: It is not an issue here.

MR. BROWN: The proofs of custom tending to show what the rules of navigation are——

THE COURT: I shall exclude the evidence.

Mr. Brown excepts.

MR. BROWN: In order not to be put to the necessity of asking similar questions to witnesses, I want to offer to prove by eight competent navigators that the custom is for vessels on this stage of the tide, bound up the harbor with tows, to navigate near the westerly margin of the channel.

THE COURT: I can't take notice of that. Put your witnesses on the stand, and I will rule on it.

Q. Where was your crew placed prior to the collision? A. I believe two of them were working on deck; there was one man on the starboard float, and I guess the rest were all in their regular positions on the boat; that is, the cook, the engineers, and the oiler.

Q. How far had you proceeded on your course when you took special notice of the French liner? A. We were about abreast of Buoy 15.

Q. About what hour was that? A. 10.35.

MR. JONES: He hasn't stated that he took any special notice of the French liner.

THE COURT: Ask him where the liner was, and where he was, and what he saw of her?

MR. JONES: I object to Mr. Brown's question on the ground that the witness has not

stated that he at any time took any notice of the French liner.

Objection sustained.

THE COURT: Go on, Mr. Brown, and ask what the positions of the vessels were.

Q. Did you ever take special notice of the French liner, or not? A. I did; I noticed her coming down.

Q. Where were you when you took such notice, and where was she? A. We were abreast of Buoy 15, or below Buoy 15, and she was below Castle William; a little below the fort, I should think, coming to the southward.

By the Court:

Q. How did she bear from you? A. She was on our starboard bow; about two points, or two and a half points.

Q. What part of the channel should you say she was in? A. She was in the ship channel; coming down a little below the fort.

Q. But how far to the eastward or westward of the anchorage line? A. She was to the eastward of me, and I was on the margin of the anchorage ground, coming up along on the edge of it.

By Mr. Brown:

Q. Was the French liner in the center, or to the eastward or to the westward of the channel? A. She was about on the center; I was on the extreme westerly edge of the anchorage buoy; what you call the clear channel.

Q. Which side light could you have seen if it had been night? A. The starboard light, undoubtedly.

Q. What lights were you showing to him? A. Our starboard light.

Q. You saw his starboard bow, did you? A. I saw the whole starboard side. 65

Q. About how far away should you judge she was at that time? A. Well, she was about, when he blew the first whistle that I took notice of, I should think, about three or four lengths, and started to sheer about the same time.

Q. Under what headway were you at that time; what speed were you making? A. We were going, I should think, about five miles an hour, considering the distance we had covered; it is only five miles from St. George to the Battery, and we were slightly over half way up there. 66

Q. Were any other vessels around you at that time? A. Only the vessels that were anchored.

Q. How about vessels under way; were there any under way around there? A. The tug *Walter Tice,* we had just passed her previous to the collision and she was on our starboard quarter.

Q. How far should you think she was to the eastward of your course? A. He was quite a little way on our quarter; I don't know exactly how far, seven or eight hundred feet. 67

Q. Was her course parallel to you, or diverging? A. He was bound for the Bay, but she was nearly parallel.

Q. How far had you left her astern at the time you speak of? A. She was about a quarter of a mile from us.

Q. How much was her course to the eastward of your course? A. I don't know how he was heading after he passed us, but he was quite a little way away from us, on our quarter. 68

Q. Give us some idea. A. I should think he was seven or eight hundred, or a thousand feet, or something like that, on our quarter.

Q. You have spoken of hearing a whistle; whose whistle was that? A. I only heard the whistle from the steamer; that is all.

Q. The *Bretagne?* A. Yes.

Q. What whistle did you hear? A. One whistle; that is, previous to his alarm whistle; that was after I blew my alarm.

Q. At that time was there any danger to these vessels, so far as you know? A. I didn't notice anything; they were going along serenely.

Q. Did you notice that that whistle was for you?
70 A. I did not, until I saw the ship sheer.

Q. When did you see the ship sheer? A. Immediately after the whistle was blown.

Q. Which way did she sheer? A. She sheered towards us.

Q. When you saw that what did you do? A. I immediately blew an alarm whistle, when I saw how rank her sheer was becoming.

Q. Did you do anything else? A. I blew our alarm whistle, and rang to stop and go back.

71 Q. In what order did you do these things, about the alarm whistle and the stopping and backing? A. I blew the alarm whistle first, and then rung to stop and back; and sung out to the crew to look out.

Q. Did you stop and back your engines as soon as you finished your alarm whistle? A. As soon as I finished the alarm whistle, yes, sir, I started to.

Q. What happened after that; what can you say of your changing your own speed, or the headway
72 of the French liner, or any change of course on the part of either vessel? A. Well, I called my men to get off—I knew we couldn't very well get away from each other; we were bound to come together; the ship kept on coming; she must have backed at the time and lost considerable speed, and so did we, but not enough to keep us from coming together. I don't know how fast she was going when we got together.

Q. To what extent did you check your headway

73 before the collision? A. I think we did some, but I don't know how much; considerable though.

Q. Did you still have considerable headway forward? A. Slightly; but I don't think we had it all checked; we didn't have much headway.

Q. How about the headway of the French liner; did she still have headway? A. I think she did, yes; she had two or three knots, very likely.

74 Q. What sort of a blow was received? A. It was hard enough to cut into the float some considerable; it parted and lost our lines, and tore the floats adrift.

Q. How far did it cut into the float? A. About ten feet; and it struck the float on the starboard bow, about a hundred feet from the starboard bow of the float.

Q. That is, forward of amidships on the float? A. I am counting from the bow in; it is about 300 feet, and that would be——

75 Q. What effect on your heading did the reversing of your engines have? A. It naturally pulled our bow a little more to the westward than we were originally.

Q. Why should it have that effect? A. On account of our starboard float being the heaviest float; the tendency would be to pull her around.

Q. Can you form any judgment of how much you turned, in points, after you reversed your engines, up to the time of the collision? A. I

76 should think about a point and a half, or something like that; possibly two points.

Q. How much do you think the French liner changed her course after she blew the one whistle, up to the collision? A. I should think four or five points.

Q. What was the angle of collision, as nearly as you can estimate it, between the keel line of the French steamer and the side of the carfloat that

77 was broken? A. I should think about, not over 45 degrees, or about 45 degrees, or something like that.

Q. That is, the French liner was still forward of the beam of the float at the time of the collision? A. Oh, yes, sir.

Q. Suppose the French liner had started in ample season to pass to the westward of you
78 under a port helm; can you tell what you consider the propriety of such a maneuvre, at that time?

Objected to.

THE COURT: I shall take that.

Mr. Jones excepts.

A. I don't think it would have been a very good move for anybody that was a sane person to make, with a vessel of that size.

Q. What is your reason? A. On account of the
79 vessels anchored to the westward; there wasn't room.

Q. Where were they anchored to the westward of you? A. We had just passed the barge called the *Moonbeam,* about 150 feet away; and she was anchored, and the steamboat *Rushington,* which lay directly across the channel; not across, but heading about northwest, with the slack water; we had passed her about a quarter of a mile astern, and several other barges.

Q. How close to the anchorage were these ves-
80 sels? A. We were on the edge of the parallel line of the buoys, and they were——

Q. Give an estimate. A. I should think the *Moonbeam* was about 150 or 200 feet to the westward of us.

Q. And you were on the margin of the anchorage grounds? A. Yes.

By the Court:

Q. Do you mean you were on the margin, your-

self? A. Yes, sir, with the floats; we were heading parallel to the buoys of the anchorage ground.

Q. Your tow was partly on the anchorage ground? A. We were along the edge of it.

Q. Do you mean your float was, or your tug was? A. I should say my whole tow; the tug and floats, because that includes the two boats with the tug; I don't believe we were inside of the anchorage ground, but we were skirting the par- 82
allel line of the buoys; with the whole tow, the two carfloats and the tug, together.

By Mr. Brown:

Q. The *Moonbeam* was about 200 feet from the margin? A. Yes, sir.

Q. Were any other anchored vessels closer than that? A. Nothing closer than the *Moonbeam*.

Q. Did you have any opportunity of judging the trim on the French boat? A. After the col- 83
lision I thought she was by the head; or while she was backing, at the time of the collision, I thought she was by the head.

Q. What effect does that usually have on a steamer, as to her steering? A. It would make her steer bad.

Mr. Jones: How does he know?

The Court: If a vessel is not well trimmed, she won't steer well.

Mr. Jones: Of course not; but that is a 84
vague suggestion; he does not know what the condition was.

The Court: Mr. Brown, you can ask him if he knows how she was trimmed.

Q. How was the French liner trimmed at the time of the collision? A. I am not positive, but I should judge that she was by the head.

Q. What effect would that have on her naviga-

85 tion? A. I accounted for the rank sheer in that way; if she was by the head—I couldn't judge of any other reason why she should take such a sheer.

Q. What happened after the collision? A. What I noticed was, the cars on the port side of the float—immediately the stem of the steamer struck the float the cars on the port side of the
86 same float started to run overboard, and all, I believe on that side—I think six—ran overboard, but one; and one car on the starboard side of the float run overboard; the other float the deck lines between them were all broken; the tug still stayed on the port side of the float, that was struck, her backing naturally backed the starboard float around the port bow of the steamer, until she cleared, and then she backed around herself; the tug made a complete circle, herself.

Q. Did you receive any salvage assistance that
87 day?

MR. JONES: Isn't this a matter for the Commissioner?

THE COURT: I will take it.

Exception.

A. The tug *Brinton,* Captain Knott, picked up our tug and pushed her over, so that we could get on board; I and the crew were on float *67,* which was
88 adrift then, in the bay.

CROSS-EXAMINED by Mr. Jones:

Q. What is the height of your pilothouse above the level of the water? A. I couldn't give you the exact figure, but I should think about fourteen or fifteen feet.

Q. Do you know the height of the deck of these carfloats above the level of the water? A. I don't know the exact height, no, sir; I never measured them.

89

Q. Do you know the ordinary height of a large freight car, which I presume was the character of those on this carfloat? A. Yes, sir.

Q. About how high? A. Well, I don't know, but about 14 feet above the rail, I should think; that is the limit, if I am not mistaken; that is, I have read of that being the limit.

Q. Well, you don't know? A. Not positively; I am not a railroad man.

90

Q. Do you know the height of an ordinary freight car; the standard height? A. I don't know; I never measured them.

Q. You say that your tug was making about five miles an hour with these carfloats? A. Yes, sir.

Q. In that condition of things you had perfect control of your tug and your carfloats? A. Yes, sir.

Q. You could have stopped, or changed your course, without any difficulty or embarrassment? A. Yes, sir.

91

Q. Why do you say that the view that you had from your pilothouse was about 12 inches above the freight cars? A. Well, I judge that my head was about that much above the height of the cars.

Q. Do you think your pilothouse could have been seen from the steamer? A. Yes, sir, I am positive of that.

Q. You are equally sure, of course, that your funnel, which I presume like all other tugboats, was higher than the pilothouse, could be seen from the steamer, clearly? A. Yes, plainly.

92

Q. Now, you say that if this collision had taken place at night your starboard light would have shown itself to the starboard light of the *Bretagne?* A. Yes, sir, both starboard lights; we were starboard to starboard.

Q. In that condition of things, even if it involves repetition, will you please explain how the collision occurred? A. Do you wish me to explain

how it occurred? I can't explain, only that the steamer blew one whistle and ported her helm; that is my only explanation that I can give as to that; it was a sudden sheer of the steamer.

Q. And as a result of that your starboard light —— A. Still showing to starboard——

Q.—would still show to starboard, but the port light of the *Bretagne* would become visible? A.
94 Not till after the collision; it was not visible until after the collision; not from my pilothouse; it would not have been visible from my pilothouse till after the collision; her port light; I didn't stay in the pilothouse to see it, but——

Q. Why were you on that side of the channel when you were going to Pier 21, North River? A. We were going to Pier 27; we were trying to save all the slack water that we could across the bay.

THE COURT: Mr. Jones, do you want to
95 open the door to this question that I have ruled out?

MR. JONES: No; I am only touching it; but I will follow your suggestion.

Q. You say the tide was the beginning of the ebb? A. It was after high water.

Q. Do you think that the condition of the tide had any effect at all upon the navigation of either one of the vessels? A. I don't think it did; no,
96 sir; it was high water slack.

RE-DIRECT EXAMINATION by Mr. Brown:

Q. In answer to Mr. Jones' questions you have testified that you were trying to save all the slack water that you could; how would that enable you to save the slack water to navigate as you did navigate? A. As the East River tide runs out of the East River it makes out there first; it gets straight across the channel, which the French

liner had already crossed, and comes down to the westward, after high water, and the last of the ebb tide, if we follow the flats up when the tide had started to run down—we naturally get into the East River tide before we mean to, so we stay out in the middle of the channel; everybody does that, to endeavor to save all the slack water we can across the bay.

Q. At such time what are the tidal conditions in 98
the North River? A. It is falling, but it is running up; it is still flood.

Q. At that time, and for some time afterwards is there any difference in the current at the different portions of the channel? A. Yes; at the mouth of the East River the first of the ebb tide sets right straight across the channel, to the westward; in a southwesterly direction; a W SW direction. We were between the Buttermilk Channel tide and the East River tide. 99

Mr. Brown: I would like to renew my question about custom.

The Court: I will take it.

Mr. Jones: Then I will withdraw my question relating to that.

The Court: It is too late for that.

Mr Jones excepts.

Q. Is there any custom among steamboat men in New York Harbor as to the course followed by a 100
tug towing a heavy float, or a heavy tow, on the first of the ebb tide, in respect of the course she follows coming up from Staten Island to the North River?

Objected to.

Objection overruled.

Exception.

101 Edward G. Clarke.

A. We would follow the course that that tug followed.

Q. State it in general terms, without reference to the course you took? A. We came up the bay in the middle of the ship channel, right up the middle of the bay; at that stage of the tide.

Q. Do you come up in the center of the bay, or the west side, or the east side? A. About in the
102 center of the bay, all the way up.

Q. Was that what you were doing that day? A. We were slightly to the westward of the center, but we were outside of the anchorage ground, which would make us pretty nearly out in the middle of the bay.

Q. What I want to know is whether you were following the customary route, or a different route? A. We were following the customary course at that stage of the tide.

103 Mr. Jones: I object to the question, and move to strike it and the answer out, on the ground that it involves a conclusion.

The Court: Let it stand.

Mr Jones excepts.

Q. How many of those who were on your tug and float are here to-day as witnesses? A. I don't know exactly, but I guess all my crew is here.

Q. Are there any ones that are absent? A. I
104 think probably the deckhand is absent.

Q. Have efforts been made to get him here? A. We tried to get him I believe, but I think he is east.

Michael J. Coleman. 105

MICHAEL J. COLEMAN, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Brown:

Q. You are a tugboat captain? A. Yes, sir.

Q. And have been how long? A. Twenty-two years.

Q. What is your present tug? A. The *George Hughes.*

Q. Were you in command of the tug *Tice* on the 106
day of this accident? A. Yes, sir.

Q. Do you hold a license? A. Yes, sir.

Q. Which? A. Master's and pilot's.

Q. Tell us how long? A. Twenty-two years.

Q. What was your tug doing on the day of the accident? A. Towing three canalboats.

Q. Between what points? A. Between Elizabethport, New Jersey, and Jersey City, New Jersey.

Q. Light, or laden? A. Laden. 107

Q. With what? A. Coal.

Q. How did you tow them? A. Two on the port side and one on the starboard side.

Q. Did you see anything of the *Narragansett* and her carfloats that day? A. Yes, sir.

Q. How far had you got when you saw them? A. She passed me between Robbins' Reef and Oyster Island.

Q. Which side of you did she pass? A. The port side. 108

Q. Were your courses parallel, or different? A. About parallel at the time.

Q. How far had you got when you first noticed the French liner? A. I was astern of the *Narragansett,* and took notice of her coming out of the mouth of the North River.

Q. Were any whistles sounded by any one of the three vessels; I mean yours, the *Narragansett,* and the French liner? A. I blew a signal to the French liner; I blew first.

109 Michael J. Coleman.

Q. What was the whistle? A. One whistle.

Q. What was the situation of the three vessels at that time? A. The *Narragansett* was on my port side ahead, about a thousand feet; and the French liner was direct head and head.

Q. With your vessel? A. Yes, sir, right head and head.

Q. Was your course at that time still parallel
110 with the course of the *Narragansett?* A. Yes.

Q. What part of the bay was the *Narragansett* navigating at that time? A. She was on the western edge of the channel.

Q. That is, close to the anchorage ground? A. Yes, sir.

Q. By how much do you think the courses of your two vessels, yours and the *Narragansett,* were separated; by a straight line? A. Fully a thousand feet.

Q. At the time you first blew to the river liner
111 which of her side lights would you have seen had it been night? A. I would have saw both lights.

Q. Which of yours would she have seen? A. Both.

Q. When you blew to her did you get any reply? A. A few seconds after, I got one whistle from the French liner.

Q. At the time of this exchange of whistles can you state which would be the relative courses of the *Narragansett* and the French liner; whether
112 they were head to head, starboard to starboard, or port to port? A. Starboard to starboard; broad starboard to starboard.

Q. At that time was there any such danger as between the *Narragansett* and the French liner, in your judgment? A. No, sir, I don't think so.

Q. Any necessity for the *Narragansett* to blow whistles? A. No, sir, I don't think so.

Q. What happened after the *Bretagne* blew her one whistle? A. She kept coming for me for a few seconds, and then sheered to their starboard.

Q. When you say starboard do you mean westward, or eastward? A. I mean to westward.

Q. Go on and tell what was done by the French liner and the *Narragansett?* A. After I blew the whistle to the French liner she proceeded probably one length, and then started to sheer to starboard—I had an opportunity to see if—and kept on going to starboard until there was about to be a collision, and I heard Captain Clarke sounding danger signals and also the French liner whistles; and I noticed that the *Narragansett* backed and also the French liner backed, and kept going to starboard until they crashed.

Q. How soon after the French liner began to sheer did you hear any whistles from the *Narragansett?* A. Oh, she had made a couple of lengths at least.

Q. How soon after that time did the *Narragansett* reverse, as compared with her alarm whistle, if you know?

MR. JONES: How does he know that.
MR. BROWN: I said, If you know.
THE COURT: I will take the answer.
Mr. Jones excepts.

A. Well, immediately.

Q. How do you know? A. Because I saw her reverse.

Q. To what extent do you think the movements of these two vessels was checked at the time of the collision? A. The *Narragansett* was about still, I should think, from the position I was in; she hadn't much headway at all, if any.

Q. And how about the French boat? A. She was coming along pretty good.

Q. Were you in a position to tell whether the pilothouse of the *Narragansett* was high enough to overlook the cars on the floats that she was towing? A. She could overlook loaded cars all right.

Q. Did you notice the trim of the French liner at or about the time of the collision? A. At the time of the collision, of course, when they were stopped together, I noticed her; yes; she was, I should say, about on an even keel, as near as I could judge.

Q. Is that the usual trim of steamers of her class? A. I don't know.

No Cross-Examination.

Edward Knott, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Brown:

Q. You are a tugboat captain? A. Yes.

Q. How long have you been such? A. Sixteen years.

Q. Do you hold a master's and pilot's license? A. Yes.

Q. And have for how long? A. Sixteen years.

Q. What tug are you in command of? A. The *Overbrook.*

Q. Did you see anything of the collision between the float and tow of the *Narragansett* and the steamer *La Bretagne?* A. Not until after they struck.

Q. What tug were you in command of at that time? A. The *Brinton.*

Q. What trip was your tug making? A. We were coming from Gowanus light to our stakeboat.

Q. What is the position of your stakeboat? A. About a thousand feet in a northeasterly direction from Bedloe's Island dock.

Q. How does that compare with the point where the anchorage ground makes a right angle turn? A. It is on the inside of the anchorage.

121

The chart is produced to witness, who indicates a position well to the westward of the corner referred to.

Q. Your stakeboat is on the anchorage ground, is it? A. Yes.

Q. What was the situation of the *Narragansett* and the French liner when you first noticed them that day? A. When I first noticed them the *Nar-* 122 *ragansett,* I should think, was about 1,600 feet, or may be a thousand, below the Black Tom buoy, when I first noticed it; the steamer was up around Bedloe's Island.

Q. And your tug was where at that time? A. We crossed in between their two courses.

Q. Do I understand that you hadn't noticed them until after you passed between them? A. I hadn't noticed them before I passed between the steamer and the *Narragansett.* 123

Q. My question was before you passed between? A. It wouldn't be any different.

Q. The situation you have already described was where you first saw them, and that was before you passed between? A. Yes.

Q. Where was your tug when you noticed them? A. My tug was on the outside of the anchorage at that time.

Q. When you were passing in a direct line between the two vessels did you have an opportunity 124 of telling how their courses lay with regard to each other? A. The *Narragansett* was running on a line with the anchorage ground, the westerly edge of the channel, and the French boat was up off Bedloe's Island and to the eastward of her course.

Q. Was the course of the French boat parallel with that of the *Narragansett,* or different? A. It was parallel.

125 Edward Knott.

Q. Which side light would either boat have seen of the other if it had been night? A. The starboard.

Q. The *Narragansett* would see the French liner's starboard light, and the French liner the *Narragansett's* starboard light? A. Yes, sir.

Q. Were you in a position, as you passed between them, to be able to tell that accurately;
126 could you tell certainly as to that? A. Yes, sir.

Q. After you passed between them did you continue on a straight course, or did you make any turn? A. I went just on the inside of the *Narragansett,* and then turned up.

Q. Under what wheel? A. Under a port wheel.

Q. You have stated that the *Narragansett* was navigating along the line between the anchorage and the channel; is there any custom in that regard on this particular stage of the tide?

127 Objected to.

Objection sustained.

The Court: It was opened only as to the other witness.

Exception.

Q. Did you notice any other vessels besides these two, in that vicinity? A. Yes, sir; the *Tice.*

Q. Where did you see her? A. She was to the eastward of the *Narragansett;* below her.

128 Q. A little further down the bay? A. Yes, sir.

Q. Did you hear any whistles blown? A. Yes, sir, after I got straightened up on the inside of the anchorage—just close to Black Tom buoy—I heard one whistle blown.

Q. By what boat? A. I don't know what boat it was.

Q. What direction did it come from? A. Off on the starboard quarter.

Q. From your starboard quarter? A. Yes, sir.

Q. What was the direction of the French liner from you at that time? A. Well, on our starboard bow.

Q. Did you hear any further whistling? A. Yes, sir, I heard an alarm whistle after that.

Q. Did the alarm whistle come next after the whistle on your starboard quarter, or was there some other? A. After the whistle on our starboard quarter the alarm whistle came next; it seemed to be a little on our starboard quarter.

Q. What boat blew the alarm? A. I couldn't say what boat.

Q. What direction did you hear that sound come from? A. A little on our starboard quarter.

Q. The same direction of the other, practically? A. No, not exactly, it didn't appear to be.

Q. Did you hear the French boat blow her whistle at all? A. I heard her blow one whistle in answer to the whistle I heard on the starboard quarter, and then there was an alarm whistle blown by the tug behind us, and the French liner answered it.

Q. What was the signal given by the French liner, first? A. One whistle.

Q. When did she give that as compared with the first whistle you heard on your starboard quarter? A. Shortly after; it appeared to be an answer to that one on the starboard quarter.

Q. After that one blast what was the next whistle signal? A. An alarm whistle.

Q. From what direction? A. It came from down the bay.

Q. Also on your starboard quarter? A. Yes, sir.

Q. After that, what whistles came next? A. An alarm whistle from the French liner.

Q. What do you think the French liner was making in the way of speed when she first blew

133 her one whistle? A. I couldn't judge that; probably 10 or 12 miles an hour, as near as I could judge.

Q. Did you see any checking of her speed? A. Not at that time, no, sir.

Q. Did you at all before the collision? A. No, sir.

Q. Did this collision happen abeam of you or
134 abaft your beam or forward of your beam? A. It happened on my starboard quarter; I was going up the bay all the time.

Q. After the French liner had passed the stern of your starboard beam did you turn and look? A. My attention was called to him by the deckhand, and he said there was going to be a collision, and then I turned and looked.

Q. What did you see at that time? A. I saw the steamer in collision with the carfloat.

135 Q. Already in collision? A. Yes, sir, the carfloat was swung around on her port side.

Q. They were actually in contact at that time? A. Yes.

Q. Who was your deckhand? A. A man by the name of Heater.

Q. Do you think there was room to the westward of the course that you saw the *Narragansett* following, for a vessel of the size of *La Bretagne* to lay her course? A. No, sir, I shouldn't think so.

136 Q. What is your reason for that? A. Because of the vessels at anchor there.

Q. Were you in a position to notice whether or not the pilothouse of the *Narragansett* was high enough to overlook the cars on the floats that she was towing? A. Yes, sir.

Q. What was your observation in that regard? A. He could see over those tows; over the cars.

Q. Did you notice the trim that the French liner was in? A. When she stopped she appeared to me to be slightly by the head.

137

CROSS-EXAMINED by Mr. Jones:

Q. Upon what side of the channel do you think the *Bretagne* ought to have proceeded as she was going out that day? A. I know what the rule calls for, the right hand side, but I had seen her coming down all sides; she passed us a number of times on the starboard side.

Mr. Jones moves to strike out so much of the answer as is not responsive. 138

Motion granted.

Q. Was she on the right hand side of the channel that day, or not? A. As near as I can judge she was; pretty close to the flats.

Q. What in your judgment as a navigator would have been the proper maneuver of the *Bretagne,* sighting this carfloat and her tow, in the conditions that you have described? A. I couldn't say; a man might act different from what they acted, 139 I couldn't say.

Q. Don't you know that it was the duty of the *Bretagne* to continue her course on the right hand side of the channel? A. Not as I understand the rules; it says in all cases avoid collision.

Q. That is true; but I ask you now on the supposition that your judgment might be formed in circumstances prior to the danger of collision; don't you know that it was her duty to continue on the right hand side of the channel? A. No, I 140 don't know as it was her duty to continue on it.

Q. If I understand your story in substance it is that the *Narragansett,* with these carfloats hugging the westerly side of the channel and in such a position that if the side lights of the *Narragansett* were exhibited to the *Bretagne* it would show her green light, and if the lights of the *Bretagne* were visible her green light would be exhibited to the *Narragansett,* so that if they continued their

141 courses there couldn't by any possibility be a collision. I understand you to say that as a matter of fact, or in your opinion this steamship navigated by presumably competent officers, deliberately changed her course and ran into the *Narragansett* and her carfloats? A. That is what I think.

Q. That is what you think? A. Yes, sir.

142 Re-Direct Examination by Mr. Brown:

Q. If the *Narragansett* and the French liner had continued without any change of helm on the part of either, after you passed between them, could they have cleared each other safely, in your judgment? A. Yes, sir.

Q. By what margin? A. By about five or six hundred feet.

Q. Could you see any reason there in that situ-
143 ation why she couldn't have changed her course? A. No, sir, I didn't unless to sheer out of the way, or something like that, on his port side.

John B. Roberts, being duly sworn as a witness for the libelants, testifies:

By Mr. Brown:

144 Q. You are a tugboat captain? A. Yes, sir.

Q. And have been how long? A. Fourteen years.

Q. How long have you held a pilot's and master's license? A. I have held a master's about eleven years and a pilot's about fourteen.

Q. What tug were you in command of that day? A. The *Independent*.

Q. What trip was that tug making that morning? A. I was bound from Jersey City to 42nd Street, South Brooklyn.

145 Q. Where did you first fall in with the French liner? A. She passed me off the upper anchorage buoy, on the Jersey flats.

Q. To which side of you? A. She passed me on my port hand.

Q. You were heading about how, by compass? A. We were heading about south.

Q. After she passed you what maneuver did you undertake? A. I kept on my course.

146 Q. How far had you gone before you noticed the *Narragansett?* A. I noticed both of them after the alarm signals were blown; that was what attracted my attention to them.

Q. Which alarm signal did you hear first? A. The *Narragansett.*

Q. What was the position of your tug with reference to the liner at the time you heard that signal? A. About directly astern of the liner.

147 Q. About how much astern, what distance do you think? A. It might have been a thousand or twelve hundred feet, and maybe more.

Q. I understand you were heading across her course at that time? A. Yes, sir, I slowed down and let her pass across my bow.

Q. You were passing from her starboard side to her port side? A. Yes, sir.

Q. Your attention being attracted by this alarm signal, what did you see? A. I could see the steamer heading towards—when they first blowed the alarm whistle I could see the *Narragansett* 148 to the westward of the steamer.

Q. Were you in a position to judge as to which side light each could have seen of the other at *night?* A. Green to Green.

Q. What part of the harbor was the *Narragansett* navigating in ? A. On the edge of the anchorage ground.

Q. How was the course of the French liner as compared with the *Narragansett?* A. About parallel.

149 Q. Was the French liner making a straight course at that time, or was she turning? A. When she passed me she was making a straight course.

Q. At the time of the alarm whistle? A. She had a slight sheer to starboard.

Q. What did you see or hear after that? A. After that I went to their assistance, to render
150 what assistance I could; I took one of the floats away.

Q. You have stated that your attention was attracted by the alarm whistle from the *Narragansett;* what other whistle did you hear? A. I heard no whistles, only the alarm.

Q. Did you hear the alarm from the French liner? A. From both boats, the two of them whistled.

Q. You have stated that you saw the French
151 liner turning toward the westward; can you form any opinion as to how much she turned up to the collision? A. I should think she turned about three or four points.

Q. Did she continue turning, or did she check her turning? A. She was turning when they came together.

Q. Were you watching them from the time you passed the stern of the French liner up to the time of the collision? A. From the time of the signals I was looking at them, yes, sir.

152 Q. During that same time what was the *Narragansett* doing? A. I couldn't say what she was doing; I heard her whistle; that was all.

Q. Can you say whether she kept her course or whether she changed? A. She was obstructed, and then I was astern of the steamer.

Q. That is the liner was between you and the *Narragansett,* and you couldn't see? A. That is right.

Q. What do you say about the speed of the

153 liner; her original speed, before the whistle was sounded, and afterwards? A. Her speed when she passed I should think was about 10 miles an hour.

Q. Was it continued up to the time of the collision, or was there any checking of her speed? A. After I heard the alarm whistles I saw that the steamer was backing.

154 Q. Do you think, as a navigator, that it was practicable at any time that you saw these vessels for the French liner to have ported and passed to the westward of the *Narragansett?* A. I wouldn't have passed her there.

Q. Do you think it was practicable? A. No, sir.

Q. Do you think it was a safe thing to do? A. No, sir, because there wasn't room enough between the *Narragansett* and the vessels anchored on the Jersey flats.

155

Cross-Examined by Mr. Jones:

Q. Your idea, captain, is like that of the last witness, that this steamer deliberately ran into the *Narragansett* and carfloats? A. Well, I don't say that it was deliberate; but she might have taken a sheer to avoid something else, and they couldn't break it.

Q. Well, I am not asking you about what she might have done; you seem to know a good deal about what she did do; is it your opinion that this steamer deliberately, in violation of the rule of the road, ran into the *Narragansett* and her *carfloats?*

156

Objected to as argumentative.

The Court: I will allow it on cross examination.

Exception.

157 John B. Roberts.

A. In violation of the rules; I heard no signals at all in regard to the rules of the road. I didn't hear any whistles, or my attention wasn't drawn to them until I heard the alarm signal.

Q. That is not what I asked you; I asked you from what you saw and heard, whether in your opinion, as a navigator, the *Bretagne* in violation of the rule of the road, deliberately ran into the
158 carfloat and her tug? A. No; I wouldn't say so.

Q. If, in answer to the last question, you say that you do not think the *Bretagne* deliberately ran into this carfloat in violation to the rule of the road, what explanation have you to give of what she did on that occasion, assuming that she was properly manned and navigated? A. From my position and their action I say that she took that sheer under her port wheel, she couldn't right, and when she started to back it had a tendency to
159 swing her more that way, because the propeller, with single propellers, they will back to port and their bow to starboard.

Q. Don't you assume, if you haven't knowledge of that fact, the ability of a powerful steamer like that to overcome those tendencies?

Objected to as mere argument.

THE COURT: I will allow it.

Exception.

A. I don't see how they can overcome it.

160 Q. Have you ever examined or had anything to do with the navigation of a large steamer like the *Bretagne?* A. I have had many dockings of them; they might not have been quite as large as *La Bretagne.*

Q. There was nothing in the condition of the tide in its swing one way or the other, or in its ebbing or flow, that interfered with the navigation of the *Bretagne,* in your judgment, was there? A. No, sir.

161 Q. Then how do you account, without assuming that the navigators of the *Bretagne,* not only violated the rule of the road, but were men without any prudence in navigation at all, for this collision, according to the story you give, and according to the stories given by the other witnesses that have been examined? A. I didn't say that they violated any rules; have I? You asked me that, and I said no.

162 Q. Wasn't it the duty of the *Bretagne* to keep the right hand side of the channel going down? A. According to the rules of the road, I suppose it was, yes, sir.

Q. Wasn't it her duty to keep her speed and her course? A. Providing it was clear.

Q. Yes. And if I understand you the *Bretagne* had the *Narragansett* and her tow on the port side of the *Bretagne?* A. Starboard.

163 Q. Then your idea is that having the carfloat and the tug on her starboard hand the *Bretagne* in broad day light changed her course and ran into the carfloat; is that your idea? A. That is the way it appeared to me, yes, sir.

Re-Direct Examination by Mr. Brown:

Q. You have stated in answer to Mr. Jones' question that it was the duty of the *Bretagne* to keep her course; please state whether or not she in fact did keep her course? A. No; she altered her course about four points when she hit the *Narragansett.*

164

Re-Cross Examination by Mr. Jones:

Q. How did the sidelights of the *Narragansett* and the *Bretagne* bear to each other at the time of the collision? A. Just at the time?

Q. Yes. A. Well, I think that the *Narragansett* could have seen both lights of the steamer and the

steamer could see the red light of the *Narragansett;* that was at the actual collision.

Q. How was the *Bretagne* heading at the time of the collision with reference to the course of the river? A. I should think the *Bretagne* was heading about W by S at the time of the collision.

Q. Without giving the compass directions, which I can form myself, can you tell me with reference to the course of the river or the channel? A. The course down the bay is S SW, or SW by S.

Q. Was the *Bretagne* heading to the eastward, an easterly direction across the channel or was she following it, or was she going to the westward? A. She was going to the westward.

Q. Out of the channel, if she continued her course? A. Yes, sir.

By the Court:

Q. And on the anchorage ground? A. Yes.

By Mr. Jones:

Q. As she proceeded she would have landed on the anchorage ground? A. Yes, sir.

Q. What was the ordinary depth of water on the anchorage ground? A. There is good water where she was heading for then.

Q. Good for the *Bretagne?* A. Yes, sir.

Q. Do you know her draft? A. I know that I have anchored steamers there drawing 30 feet.

Mr. Jones: The *Bretagne* draws 32.

Charles Gallagher. 169

CHARLES GALLAGHER, being duly sworn as a witness for the libelant, testifies:

By Mr. Brown:

Q. Are you a tugboat captain? A. Yes, sir.

Q. How long have you been such? A. Seventeen years.

Q. What tug were you in command of the day of this collision? A. The New York Central tug *No. 10.* 170

Q. What trip did you make that morning? A. I was taking a lighter from the Erie Basin.

Q. For where? A. We were bound up the North river.

Q. You saw the French liner and the *Narragansett* before the collision, did you? A. Yes, sir.

Q. What was their position when you saw them first? A. I saw the liner coming down off the Fort.

Q. Castle William? A. The fort on Gover- 171
nor's Island—as I came out of the gap, and I saw the *Narragansett* with the floats going up to the westward over on the other side.

Q. How far on your course had you got at that time? A. Just at that time, I just came out of the Erie Basin at the time, as I observed them coming down.

Q. Could you tell which of these two vessels was further to the westward as between the *Bretagne* and the *Narragansett?* A. I certainly 172
could.

Q. Which vessel was further to the westward? A. The *Narragansett,* decidedly.

Q. Could you judge as to which light would be exposed on either vessel to the other, if it had been night? A. The starboard light of both.

Q. Did you see any changes of course on the part of either after this time? A. I noticed the change of course, on the part of the liner.

173 Charles Gallagher.

Q. What was that change? A. She went to the westward, under a port wheel.

Q. About how much of a turn do you think she made? A. She must have made a change of four points.

Q. Did you hear any signals? A. I heard a danger signal blown by the *Narragansett,* and it was answered by the French line ship.

174 Q. Also by a danger signal? A. They both blew danger signals.

Q. Which blew the signal first? A. The *Narragansett* was the first that attracted my attention.

Q. When did that come as compared with the sheering on the part of the French boat that you say you saw? Did you see the French boat sheer first, and hear the alarm afterwards or did you hear the alarm afterwards or did you hear the

175 alarm whistle first and see the French boat sheer afterwards? A. I heard the alarm whistle on the *Narragansett* first, and that attracted my attention.

Q. Was the French boat sheering when you looked up? A. She was.

Q. Were you in a position where you were able to tell whether the pilothouse on the *Narragansett* was higher than the roof of the cars or not? A. Previous to that, When I looked across, it being

176 a clear day, looking across I should say yes, that the pilothouse was above the top of the carfloat.

Q. Are you sure of that, or didn't you notice? A. Yes, I am almost sure that they were above the top of the cars.

Q. Did you take any notice of the trim that the French steamer had? A. No, sir, I didn't notice that in particular.

No Cross-Examination.

Charles A. Day. 177

CHARLES A. DAY, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Brown:

Q. You are a tugboat captain? A. Yes, sir.

Q. And have been how long? A. Twenty-one years.

Q. Have you a Master's and Pilot license? A. Yes, sir.

Q. For how long? A. Nineteen years. 178

Q. Did you see anything of the collision between the French liner and the *Narragansett?* A. Yes, sir.

Q. What tug were you on at the time? A. I was on the *Charles Runyon.*

Q. Were you in command of her? A. Yes, sir.

Q. What trip were you making? A. I had been to Barren Island and got two scows and was coming back up the bay when I saw them.

Q. Bound for what part of the bay? A. Bound 179 up the North River.

Q. About where were you when you first noticed the French liner and the *Narragansett?* A. I was probably a quarter of a mile behind, and the *Walter Tice* came up with two scows astern on a hawser.

Q. What was your course as compared with the *Tice's* course; were you directly astern, or to starboard or port? A. I was just a little bit to the port of the *Tice;* she was heading almost 180 straight for the steamer.

Q. On which side of your course was the *Narragansett* navigating? A. She was to the port of us.

Q. By how much do you think her course lay to the westward of your course? A. Oh, a thousand feet or twelve hundred feet.

Q. What do you say as to whether the courses of the *Narragansett, Tice* and your boat were or

were not parallel? A. That is what I say; about twelve hundred feet, almost parallel with us; only we were astern, but she was to the westward about twelve hundred feet.

Q. That is the situation when you first noticed the *Narragansett?* A. Yes, sir.

Q. Did you see the French liner at the same time? A. Yes.

Q. What was her position then? A. He was coming right straight down, about parallel with the *Narragansett.*

Q. Was the French liner heading to the eastward of your vessel or to the westward of your vessel? A. A little to the southward.

Q. Was she heading so that she would, at night, show you the green light or the red light? A. She would have showed me a green light.

Q. Did you hear any whistles? A. One whistle from the *Tice,* and then the ship answered with one.

Q. Did you see any change of course on the part of any of those vessels? A. Only on the ship; he hauled to starboard.

Q. That is to the westward? A. Yes, sir; ported his wheel and went to starboard.

Q. Was it a slight or a considerable change? A. Very sharp.

Q. How much of a turn should you say it was in points? A. She started, and kept going till they both blowed the alarm whistles.

Q. Did the collision finally happen? A. Yes, sir.

Q. How much of a change was the heading at the same time of the collision? A. I couldn't tell just how many points, but she was almost at right angles across the channel, when they were coming together.

Q. The French liner was almost at right angles with the channel? A. Yes, sir.

Q. You have mentioned an alarm whistle; which boat blew it? A. The *Narragansett* blew the first alarm whistle.

Q. When was that alarm whistle as compared with the signal of one blast? A. Probably a minute after she blowed and took the sheer.

Q. At the time when you heard the French liner blow her signal of one blast had she already begun to sheer, or did she begin to sheer after that? She commenced to sheer after she blowed one whistle.

Q. Was she already sheering before the *Narragansett* blew the alarm? A. Oh, yes, she had sheered quite a good deal then.

Q. What happened after the *Narragansett's* alarm? A. The French steamer blowed her alarm and they both backed, but came together.

Q. From your position could you compare the height of the cars on the floats that the *Narragansett* was towing with the height of the pilothouse on the *Narragansett?* A. Well, I could see half of the pilothouse windows on the top of the cars; a man could see over the cars all right.

Q. Was there room to the westward of the course that the *Narragansett* was following for a steamer the size of the *Bretagne* to navigate? A. No; on account of the vessels that were anchored there; that was the only thing. There was plenty of water for him to go down there, but he didn't have room because there was a barge and a steamer anchored there.

Q. If the vessels had each pursued the course you saw them on just prior to the moment when the French steamer began to sheer would there have been a collision? A. No, sir, not with these two.

Q. How would they have passed? A. Starboard to starboard.

189 Q. Can you give us an idea of the margin you think they would have had if they had pursued the courses they were on at that time? A. Yes; eight or nine hundred feet.

Q. Do you think it was as much as that? A. Yes, sir, close to that.

CROSS-EXAMINATION by Mr. Jones:

190 Q. And it is your idea, is it, also, that in broad daylight this steamer and her officers, seeing this tug and carfloat, changed her course four or five points to the westward, and ran into the carfloat? A. Well, I don't know whether she changed to run into the float or not, but she changed to clear the *Tice* coming up with a tow of canalers, because he answered his whistle; and then if he had steadied it up a little bit he would have went between the two of them, because there was plenty
191 of room between the two boats.

Q. So with plenty of room between the two boats the navigators of this great steamer, you think, instead of pursuing their course, changed the course and ran into the carfloats and the *Narragansett;* is that your idea? A. That is what they done.

MR. BROWN: Captain Roberts thinks he made a misstatement in his testimony and I would like to have him have an oppor-
192 tunity of correcting it.

John B. Roberts.

193

JOHN B. ROBERTS, recalled:

By Mr. Brown:

Q. What was the correction you wanted to make, Captain Roberts? A. In regard to the lights; because I mentioned that the steamer could see the red light of the *Narragansett,* where it would have been the green; when they came together.

Q. Could the steamer, as far as you know, have 194
seen the red light of the *Narragansett?* A. I don't think so.

Q. Was that all you wanted to say? A. Yes, sir.

MR. JONES: If the testimony of this accumulation of witnesses is all to the same point I certainly shall not make any objection; I don't see why we should keep up a mass of testimony on this branch of the case.

THE COURT: I do not see how I can help you any. 195

MR. JONES: It is within the power of the Court to stop a certain line of testimony.

THE COURT: You can put yourself on record as admitting that the other witnesses will testify to the same things.

MR. JONES: I will do that.

MR. BROWN: I have here present for examination the mate, the oiler and fireman and floatman and the steward, being all the persons on board the *Narragansett* or either of the floats at the time 196
of the collision, with one exception, and the missing man we have attempted to the best of our power to obtain, and have not succeeded. If Mr. Jones admits that their testimony will be in harmony with the testimony of the others who have been examined I will not put them on the witness stand.

MR. JONES: I will make that admission with this understanding, that the substance of their testimony will agree with the testimony of the witnesses already examined.

197 Thomas B. Mullen.

THE COURT: It seems to me that that ought to be satisfactory.

MR. BROWN: I will let them all go with one exception.

198 THOMAS B. MULLEN, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Brown:

Q. At the time of the collision were you floatman on board the *Narragansett?* A. Yes, sir.

Q. During, we will say, a quarter of an hour before the collision where were you? A. Out on the float.

Q. Which end? A. Walking around it.

Q. Were you on the bow end or the stern end?
199 A. I was on the starboard side walking on the rail outside.

Q. Were you keeping lookout forward? A. Well, I wasn't exactly keeping a lookout, you know.

Q. Did you see the French boat coming? A. Yes, sir, I saw the French boat coming.

Q. Did you see anything to indicate danger before the alarm whistles were blown by your boat? A. No, sir, I didn't see any indication of any danger.

200 No Cross Examination.

Libelant Rests.

Testimony for the Claimant.

MR. JONES: I offer in evidence the depositions of Louis Roch, Ives Morice and Joseph Mathurin, being a book of 60 pages; these witnesses are the second officer and the quartermasters on the bridge. We are in a situation of embarrassment

201

in regard to one of the other officers of the ship, who has been transferred in the service of the Company between Havre and Colon, and he is on his way to Havre now, and the Company have given instructions that he should be sent here either for examination before the Court, or the taking of his depositions, and I should like to have the privilege of taking that deposition if he should be here within ten days.

202

THE COURT: Perhaps Mr. Brown will stipulate as to that witness, as you have with regard to his.

MR. JONES: He was forward, on the bow of the ship and I will say that we have tried to expedite the trial of this case by proceeding to-day, but we have not got this witness actually in court.

MR. BROWN: I am willing to admit that his testimony, that this witness, if examined, will testify in harmony with the testimony given by the other officers, witnesses, of the French Line.

203

It is admitted that the testimony of the above witness, La Masne, who is the second leftenant, will corroborate and be in accordance with the testimony of the other officers of the vessel.

MR. BROWN: I will stipulate that the testimony of the second leftenant of *La Bretagne,* if called as a witness, would be in harmony with the testimony of the witnesses who have already been examined.

THE COURT: I think you had better wait till you are through with your testimony, and then see if Mr. Brown is willing to agree to that; otherwise he cannot stipulate now that this witness will testify to what will come hereafter.

204

MR. JONES: We may be forced to ask your Honor to allow us ten days now.

MR. BROWN: I wish to say that I do not want to be considered, by my silence, as having waived any objection to certain exhibits that were offered on the depositions; on the contrary, I press those objections.

205 Michael Sullivan.

MICHAEL SULLIVAN, being duly sworn and examined as a witness for the claimant, testifies:

By Mr. Jones:

Q. You are one of the New York licensed pilots are you not? A. Yes, sir.

Q. You were the pilot of the *Bretagne?* A. Yes, sir.

Q. On the day that she sailed from New York,
206 when in proceeding down the stream, a collision took place between the tug *Narragansett* and her carfloats, you were the pilot? A. Yes, sir.

Q. What was the condition of the weather when you drew out from the Company's pier? A. The weather was clear, and about slack water.

Q. The Company's piers 42 North River, isn't it? A. Yes.

Q. What time did you sail? A. A few minutes past ten. Probably eight or ten minutes past ten.

207 Q. In drawing out of the pier and straightening down the river, what was the position of the *Bretagne* in reference to the channel, when your heading for proceeding had been gained? A. The condition of the channel at the time in the mouth of the North River was very crowded; quite a number of tows were coming up, probably all coal laden barges; quite a number.

Q. On which side of the channel were you when the steamer straightened out? A. I kept to the west side of the channel as near as possible, and
208 most of them passed me to the eastward.

Q. That was what you conceived to be your duty? A. To proceed very cautiously and slow; we went along at slow speed and on several occassions we had to stop.

Q. And to keep on the west side? A. To keep on the west side of the channel.

Q. I presume you did that as far as practicable? A. Yes.

209 Q. Did you meet with anything of special note until you sighted the *Narragansett* and her carfloats? A. The *Narragansett* and her carfloats had no attraction for me till I got clear of the traffic above; that was up just at the mouth of the North River.

Q. About opposite the Battery? A. Exactly.

Q. Then what happened? A. I straightened her on her course down channel.

210 Q. Do you mean by "her" the *Bretagne?* A. Yes, on her natural course, the regular channel course.

Q. What was the condition of the tide? A. It was two hours and a half after high water at Governor's Island.

Q. And about how much ebb? A. At that time it was running a strong ebb.

Q. Running strong? A. Strong ebb.

211 Q. Where were you when you saw the *Narragansett* and her carfloats? A. I was abreast of the—well, a little to the northward of the middle anchorage buoy; a little to the southward of Ellis Island.

Q. How did the *Narragansett* and her carfloats bear to you at that time? A. At that time they bore about SW by S; probably a little to the southward of that, but SW by S any way.

Q. How did they bear from your heading? A. About half a point on my port bow.

212 Q. Could you judge at that time the heading of the carfloat? A. Well, in my opinion they were heading about N NE.

Q. In what direction, with reference to the channel? A. To the westward of the parallel of the channel.

Q. And they were running in toward the westerly side? A. Exactly.

Q. Did you see the *Narragansett* herself? A. No, sir, I did not; not at first.

213 Michael Sullivan.

Q. Taking up the situation from your answer to my last question I should like to have you state to the court in your own way, just as if I were not asking you any question at all, what you saw and what you heard and what happened? A. When I took notice of the *Narragansett* of course I was paying special attention to her, that is to the carfloat—I didn't know what boat it was at
214 the time—I signalled one blast of the whistle; we had been proceeding half speed and I gave the order to slow; there was no answer came from the tow——

THE COURT: I don't understand this I wish you would develop it a little and let him say where he was in the channel and where the other vessel was.

THE WITNESS: We were on the west side of the channel.

215

By the Court:

Q. How far from the anchorage ground? A. We were to the eastward of the anchorage ground.

Q. Had you gotten down as far as the island? A. Not yet; not Bedloe's Island; we were abreast of Ellis Island; that is ⅝ of a mile north of Bedloe's Island.

Q. Does the anchorage ground extend up that far? A. Still further north.

216 Q. How far were you from the line of the anchorage ground? A. Probably at that time we wasn't over 400 feet at the extreme.

Q. And you saw this other vessel on your port bow? A. On our port bow.

Q. How far should you think she was from the line of anchorage ground? A. Responding to onr whistle she would pass easily at some distance, 300 or 400 feet to the eastward of us, further.

By Mr. Jones:

Q. You can proceed in your own way; I don't want to embarrass you with questions. A. When I noticed the *Narragansett* I blew one blast of the whistle and slowed the ship down; she didn't respond to the whistle but ported, so I could see the port side of the western barge; I gave the order again to proceed; we were going at half speed and slow most of the time. Everything 218
appeared clear, and we went along about our own business, when she took a sheer again to the westward; I blew one whistle and slowed, and immediately after stopped; the *Narragansett* ported right at the ship, so I could look right between the carfloats and the towboat, and west side of the western carfloat; I reversed full speed just about —I had my hand on the whistle cord, and the *Narragansett* blew an alarm whistle; I also blew an alarm whistle; we were reversing full speed 219
at the time when we came together. In backing it might have thrown the carfloat out of position; but at no time—at the time of the collision I looked at the ship's compass, and took out my watch, and immediately afterwards looked at the time and the heading of the ship; at no time did the ship's head go two degrees to the westward of southwest.

By the Court:

Q. How far from the line of the anchorage 220
ground did the collision take place? A. Probably two or three hundred feet to the eastward of the anchorage buoy; because in reversing I was afraid the southern anchorage buoy would get into the ship's propeller, we were that close to her; in fact I spoke to the captain about it; I said "Captain, I am afraid of that buoy getting into our propeller, and it will disable us altogether."

221 Michael Sullivan.

By Mr. Jones:

Q. When you say she took a rank sheer I presume in your statement you mean the *Narragansett?* A. Exactly.

Q. Will you take these small models, assuming that the small ones with the one in the middle are the respective carfloats, and the one in the middle is the *Narragansett,* and the larger one is the *Bre-*
222 *tagne,* and indicate on a piece of paper the situation of the *Narragansett* and her tow, and the *Bretagne,* when you blew your whistles?

MR. BROWN: The first time?

MR. JONES: Yes, the first time.

The witness does as requested, and the diagram thus made is marked Claimant's Exhibit A, of this date.

THE COURT: Everything inside of the line between A and B is the anchorage ground?

223 THE WITNESS: Yes.

THE WITNESS: Bedloe's Island I will mark C, and that is the position we were in when I blew one whistle the first time.

Q. What, if anything, did the tug and her tow do when you blew your first whistle? A. They didn't answer the whistle, but ported so—almost came parallel with our course, in the opposite direction.

224 Q. Would that change of heading on the part of the *Narragansett,* so as to leave your respective courses parallel, as I understand you to say, enable the two crafts to pass each other without danger of collision? A. With perfect safety.

Q. Then, proceeding from that point where this change of course on the part of the *Narragansett* and her tow was observed by you, state, even at the risk of repeating what you have already stated, what happened? A. After I increased the

ship's speed, seeing everything was clear, the *Narragansett* took a sheer to the westward again, and immediately slowed and slowed and stopped; blew one whistle first, the moment I saw her sheer, and slowed and stopped; the *Narragansett* hauled right up at us, and came ahead so that I could see the port side of her, and I had my hand on the whistle cord, ready to give the alarm whistle, and at the same time full speed astern; the *Narragansett* blew the alarm whistle first, and we repeated a moment afterwards. While we were backing the float came directly across our bow; that we struck her easily I should say, it looked about 30 feet abaft her stern on the starboard side, and shortly afterwards the *Narragansett* backed out clear; he came right across the ship's bow and backed all the way around, and came around on the starboard quarter, and the steamboat passed under our stern and went alongside of her and stopped her.

225 226 227

Q. Now place these models on this sheet of paper, taking the larger one to represent the *Bretagne,* and the three smaller ones to represent the *Narragansett,* and her carfloats, and assuming that all that part of the paper on the narrow side of the red line is the anchorage ground, please place the vessels in their respective positions, when, as you say, the *Narragansett* with her tow straightened on a parallel course with that of the *Bretagne,* and so you thought you could proceed with safety, without collision?

228

Witness places models, as requested, and the diagram thus made is marked Claimant's Exhibit B of this date.

THE WITNESS: The tow alongside was the *Tice;* that is, I was informed that that was the *Tice.*

229 Michael Sullivan.

Q. Take the next stage of this situation with another sheet of paper, and place the models so as to show the position of the two vessels, I mean by that the *Bretagne* and the *Narragansett* and her tow, at the time of the collision, having still in view the marginal lines indicating the anchorage ground.

Witness places models as requested, and
230 the diagram thus made is marked Claimant's Exhibit C of this date.

Q. Did you make any change in your course after you had observed that the tug and carfloats had straightened up the stream to run parallel with you? A. I ported as much as I dared.

Q. What did you do that for? A. To pass to the westward on the right side of the channel.

Q. Did you make any change in your course
231 after you observed the rank sheer of the *Narragansett* and her floats? A. No, not after I was once ported. I stopped the ship; I blowed one whistle first, and stopped; slowed first and stopped.

Q. What in your opinion was the cause of this collision?

Objected to.

THE COURT: I don't think I will take that; that is a question for the Court.

232 Exception.

Q. The weather at the time of the collision was clear? A. Perfectly clear; very clear.

Q. There was nothing in the condition of the tide, if I understand you, to prevent free navigation on the part of both vessels? A. Not at all; only we were going before the tide, parallel with the channel.

Q. Your vessel was under control, was she? A. Oh, yes.

THE COURT: I want to know if he was still under headway at the time of the collision.

Q. After you had stopped your engines what headway, if any, did the *Bretagne* have? A. The momentum of the speed that she was carrying and the force of the tide; that is something you can't define very well. 234

THE COURT: I don't expect that absolutely; but I should like your judgment.

(Answer continued). The ship, from stopping to half speed, to slow, and then stop, she was going probably eight knots, and a ship of that weight and draft will carry her speed quite a way if you don't reverse her engines, and more so with a 2-knot current behind her in her favor.

Q. What speed did you have on at the time of the collision? A. Nothing more than the momentum of her—probably after the engines were stopped and the propeller was stopped, a ship of that weight will carry her speed some way, but how fast she was going is a pretty hard question to answer; we know there was a 2-knot current anyway. 235

Q. Did you have any other speed than that of the current? A. Not at all, only the momentum that she had been going by at the time the propeller was stopped. 236

By the Court:

Q. Were you reversing at the time of the collision? A. Yes.

Q. How long had you been reversing? A. Half a minute is a long while, and a minute is a long while. We had been reversing some time, but the moment we came together, as I stated, I looked at the ship's compass, I took my watch out and looked at the time——

237 Michael Sullivan.

Q. How were you heading by compass? A. Southwest.

By Mr. Jones:

Q. How does that correspond with reference to the course of the channel? A. Well, that is half to three-quarters of a point to the westward of the course of the channel.

238 Q. Did you notice whether the *Narragansett* slowed up? A. I couldn't tell.

THE COURT: He has not told us yet how fast the vessel was going through the water.

THE WITNESS: That is a pretty hard matter.

By the Court:

Q. We don't expect you to be accurate, but we
239 want some assistance; give us your best judgment. A. The ship will retain her speed; a vessel going before the tide, and coming head to the tide is a different question to answer.

By Mr. Jones:

Q. Perhaps you don't understand what the Court wants to know; what in your judgment approximately was the speed of the vessel through the water at the time of the collision? A. We were going astern; we were going astern and the
240 ship was absolutely stopped, because the anchorage buoy under the stern I was afraid we would pick up with the propeller; only with the momentum of the tide. She might have been going just barely through the water, over the ground.

Q. You say she wasn't going through the water at all? A. Not at the time of the collision it appeared to me; she looked absolutely stopped; the coal barge anchored forward of abeam and we seemed to hold that on with the island.

Q. If I understand you correctly you were stopped so far as your speed through the water was concerned, and whatever headway you had was that of the set of the tide? A. The set of the tide.

Q. What was the fact in regard to the speed of the *Narragansett* and her carfloats at that time? A. Well, I couldn't see their actions because when they sheered, in the position we hit 242 them, the boat was obscured by the carfloats.

Q. Did you see any lookout? A. None whatever.

Q. Did you see any lookouts on the *Narragansett* or on her carfloats? A. None whatever. The first man I saw on the carfloats was after the collision, and that was the man up on the other carfloats.

Q. Did he go up there after the collision? A. I don't know when he got up there, but he wasn't there during the collision. 243

Q. Did you see him go up? A. No, I did not; I was looking after the ship.

Q. What damage did you do, approximately? A. Approximately, we hit the barge about thirty feet abaft the stem, and the carfloats toppled over, and one of the barges sunk shortly afterwards, it looked to me.

Q. Was the *Bretagne* injured? A. None whatever; they reported everything safe and the ship not making any water, and not even a mark on 244 her.

Q. And she proceeded to sea? A. She proceeded to sea.

Cross-Examined by Mr. Brown:

Q. When you speak of courses do you mean according to the true meridian or the magnetic meridian? A. The magnetic meridian.

245 Q. What is the channel course from Governor's Island down to abreast of Staten Island, according to the magnetic meridian? A. S.W. by S.

Q. Isn't it S.W. by S½ S? A. Not as much to the southward as that.

Q. Can't you give it a little more accurately? A. S.W. by S. to keep in the best of the water, magnetic.

246 Q. Doesn't this anchorage chart of New York harbor correctly show the position of the channel and the channel course? A. Yes, I should say it did.

Q. Have you recently taken the direction of that course from the chart? A. No, sir, not from the chart.

Q. Have you often taken the steamer *La Bretagne* to sea? A. Yes I have been pilot of her at other times; not alone to sea but in from sea.

247 Q. What was her trim at the time of the collision as compared with her usual trim? A. Well, all I know is we get a larger draft going out than coming in, as we have a full cargo coming out.

Q. I am speaking more particularly of her draft at the bow than the stern; wasn't she more down by the head than usual on this occasion? A. I didn't know of any change, or notice any.

Q. Didn't you notice that she didn't obey her helm quite as she usually did? A. She obeyed her helm as usual at all times.

248 Q. When you gave her a little change of helm didn't she turn more than usual on this occasion? A. Not at all.

Q. You took entire charge of the ship's navigation on this occasion, didn't you? A. Yes.

Q. Who was on the bridge with you? A. The captain and the officer of the watch.

Q. Can you tell how many officers there were? A. There were two officers of the watch, one stationed at the telegraph to carry out any orders

that were given, to slow, stop, ahead, or astern, whichever orders were given, and the other officer was on the bridge.

Q. What was the station of the other officer? A. Well, he was a lookout, to observe anything that was going on.

Q. What was his position, in point of fact, on this occasion, if you remember? A. I don't know what his position was, or what capacity he was 250 in.

Q. I am not speaking of his function, but of his station; was he on the port or starboard side, or in the center? A. The officer at the telegraph remained at his station; the other officer and the captain were both together; close to me on the starboard side of me; to the westward of me.

Q. They kept always to your right hand while you were going down? A. Not at all times.

Q. They were walking to and fro? A. To and 251 fro.

Q. Did you stay in one position on the bridge? A. Well, I kept walking around; looking around.

Q. All the whistling that was done you did with your own hand by pulling the cord? A. I did.

Q. How were your orders to the engine-room transmitted on this occasion? A. Through the telegraph; that is a register.

Q. Did you work the telegraph yourself? A. No; it was done by orders passed through the 252 captain to his officer.

Q. You told the captain what you wanted to have done, and he passed the order along to the officer who stood at the telegraph? A. Yes.

Q. That was the way it was done on each occasion on the morning in question? A. That was probably so.

Q. You never worked the telegraph yourself, personally? A. Very seldom.

Q. On this occasion? A. Not on this occasion, I never put my hand to the telegraph.

Q. How were the orders to the man at the wheel transmitted? A. By word.

Q. Whose word? A. I would say "Port" and it would be answered by one of the officers, "Port," and I would say "Starboard" and it would be answered "Starboard"; "Steady," "Steady."

Q. When you gave the order "Port" what did you intend to have the ship do? A. Her head to sheer to the starboard.

Q. Do persons who speak French use orders in this way? A. I don't know.

Q. When you gave an order to port or starboard to which person did you speak? A. To the captain.

Q. What did he do? A. He gave the order.

Q. Did he speak to the man at the wheel? A. He gave the order, and it was obeyed.

Q. You don't remember whether he spoke directly to the man at the wheel, or not? A. No; I know when he gave an order it was obeyed; either to port or starboard.

Q. From the time you saw the *Narragansett* up to the collision, how many orders to the wheel did you give? A. There was no occasion to give but one order.

Q. I am only speaking of the word you actually gave? A. One.

Q. What was the order? A. Port.

Q. Wasn't it hard-a-port? A. Port.

Q. Didn't you say hard-a-port to the captain? A. I can't say I did.

Q. Do you mean you are not sure whether it was port or hard-a-port? A. Port.

Q. You haven't answered my question? A. I said, port.

Q. I am asking whether you are sure as to whether it was port or hard-a-port? A. No; port.

Q. Are you sure? A. To the best of my knowledge.

Q. Is your recollection distinct that it was port, and was not hard-a-port? A. Well, there was no occasion to put the wheel hard-a-port.

Q. The question is whether your recollection is distinct? A. To the best of my knowledge, all I said was, port.

Q. (Repeated.) The question is whether your 258
recollection is distinct? A. To the best of my knowledge.

Q. It would be the best of your knowledge if you say whether your recollection were distinct or vague; I am trying to find out whether it is distinct or vague? A. It seems perfectly plain to me I said port; I didn't say hard-a-port.

Q. How was that one order transmitted, if you remember? A. Well, it was given the usual way; port.

Q. What person did you speak to when you said 259
port? A. The captain was alongside of me.

Q. Was it the captain who transmitted it? A. Yes.

Q. Did he speak to the man at the wheel, direct? A. He turned around and ported; he said port.

Q. He didn't use the word "port" did he? A. He did first; I remember that perfectly well.

Q. Didn't he say hard-a-port? A. No.

Q. Did he afterwards repeat it in French? A. That I don't know . 260

Q. You don't remember? A. No.

Q. Who did he speak to when he transmitted it? The quartermaster.

Q. That is the man at the wheel? A. That is the man at the wheel.

Q. Was the vessel being steered by a wheel on the open bridge, or by the wheel in the wheelhouse? A. It was in the wheelhouse—I ain't positive of that.

Recess.

261 Michael Sullivan.

After Recess.

Michael Sullivan resumes the stand:

Cross-Examination continued:

By Mr. Brown:

Q. On the day of the collision in what part of the North River did you navigate before you came to the Battery? A. We came down the center of
262 the river.

Q. That course in the North River prolonged would come out well on the Brooklyn side, near Bay Ridge, wouldn't it? A. Yes, sir.

Q. How far down did you come before you gave the order to the wheel in order to change from that course that you had been on in the North River? A. At the northern anchorage buoy.

Q. Were you about midway between that buoy and Castle Garden as you passed out? A. A little
263 closer to the anchorage buoy even.

Q. About what proportion, would you say? A. Well, a safe distance; three or four hundred feet.

Q. That would be about the proportion of two to three, wouldn't it; she was two-fifths of the width between the anchorage buoy and Castle Garden, nearer on the side towards the buoy? A. We passed to the eastward of the buoy.

Q. I understand that; but I was considering in what proportion you would divide that distance between Castle Garden and the anchorage buoy?
264 A. We would be closer to the anchorage buoy; much closer.

Q. As I remember the width, there I should say that what you said would amount to about three-fifths on the Castle Garden side, and two-fifths on the anchorage buoy side? A. That is near enough.

Q. Then you gave an order to port the helm? A. Yes.

Q. Was your order "Port a little," or "Hard-a-port"? A. Never hard-a-port.

Q. Was it "Port a little," or "Hard-a-port"? A. "Port."

Q. Not "Port a little"? A. "Port."

Q. From the time you took charge of the ship at the French Line pier did you ever give any compass orders to the wheel; that is, did you direct a particular course to be steered? A. No.

Q. You said port or starboard, as the case might be, and when the vessel had swung enough you 266
said steady? A. Yes.

Q. How far down, after passing the upper anchorage buoy abreast, did you come before you said steady? A. When she got pretty near on her course.

Q. But I want to know how far you ran before you did get on your course? A. Her head was going to starboard all the time, as she was going ahead.

Q. Do you know anything about how far she ran 267
before she steadied her course? A. She would go probably an eighth of a mile, coming around gradually.

Q. Had you got straightened on that course before you got to Castle William? A. Oh, yes.

Q. Before you got there? A. Yes.

Q. When you straightened on that course what was it? A. Well, I could only judge; I didn't look at the compass at the time.

Q. Can't you tell me what point you were heading for on the shore? A. About SW by S. 268

Q. Can you give it to me the other way; what land was directly ahead? A. Staten Island would be ahead.

Q. Can you give me any point on Staten Island? A. On that range it would bring you right in to Stapleton, exactly.

Q. Exactly, did you say? A. Yes.

Q. After coming down in that position where

269 you straightened, didn't you form the purpose of navigating somewhat nearer the westerly side of the channel? A. On that occasion I did, yes.

Q. Didn't you port your wheel further in order to do so? A. Not any too much, no.

Q. I am not emphasizing that, but didn't you port your wheel further? A. Not at all; only when the occasion called for it.

270 Q. After you straightened did you hold that course until you saw the *Narragansett?* A. I did.

Q. Wasn't that in fact the course that caused your ship to converge somewhat upon the anchorage ground? A. It would bring me in closer to the westward, yes.

Q. On that course you were approaching closer and closer to the anchorage ground? A. Yes, sir.

Q. At that time what speed were you making? A. I should think about eight knots.

271 Q. After passing Castle Garden what order did you have given to the engine? A. Half speed.

Q. Did you continue under that order until you saw the *Narragansett?* A. Yes, sir.

Q. And under that order you think she was making about eight knots? A. I should think about eight knots.

Q. How far had you come when you first noticed the *Narragansett?* A. After we got straightened up on our course we had come probably a quarter of a mile.

272 Q. You had straightened and had gone only a quarter of a mile before you saw it? A. I saw her before that, but I made preparations to pass to the westward of her.

Q. You are speaking of the time when you blew your whistle? A. I am speaking of the time I straightened the ship on her course.

Q. After straightening on her course you say your ship had gone a quarter of a mile further and then something happened? A. Nothing hap-

pened; I said we had proceeded a quarter of a mile straightened up on our course, when I made preparations——

Q. What were the preparations? A. To pass to the westward of the *Narragansett;* by blowing one whistle.

Q. At that time the *Narragansett* bore SW by S from you? A. Well, about that; she was on our port bow; I didn't look exactly, but we were head- 274
ing down the channel.

Q. You testified, if I understood you rightly, that she did bear SW by S at that time? A. I did.

Q. That is as near as you can give it to us? A. Well, yes.

Q. That is, in fact, exactly what you testified to as the channel course? A. Exactly.

Q. Then if you had her half a point on her port bow that means that you were converging in to the anchorage ground half a point? A. No, we 275
were going almost down the channel course at that time; I said SW by S, and probably a little to the southwest of that at the time; but she was on my port bow at that time, when she first attracted my attention.

Q. You have drawn a diagram to indicate the position of the vessels at that time; when you blew the signal; in drawing this diagram, Claimant's Exhibit A, representing the position of the vessels at the time of your first signal, have you 276
endeavored to do so drawing the angle at which the tug and carfloat would see your vessel on their starboard bows? A. Exactly.

Q. To my eye I should say that was two or three points; is that what you intended? A. No; not two or three points; I say she was half a point —the shore, with the distance, the further——

Q. You misunderstand the question. You have stated that the tug and carfloats were half a point on your port bow; but I am talking now about the

angle on the starboard bow of the tug and carfloat, and I ask whether this diagram indicates as nearly as possible what that angle was, and you said yes, and then I asked whether that angle was about two or three points? A. I didn't say it.

Q. Then won't you correct me, and say what you intended? A. I gave you as near the diagram as possible.

278 Q. What do you think was the angle on the starboard bow of the tug and tows that your ship would have appeared at that time? A. The angle of the tow coming up and the ship coming down?

Q. I thought my question was clear; suppose you had stood upon the pilothouse of the tug, or on one of the carfloats, so as to have a clear view of your steamer, the *Bretagne,* she would have appeared on your starboard bow? A. If I was on board the tug.

279 Q. That is what you intend to say, isn't it? A. The *Bretagne* appeared on the starboard bow? Oh, no.

Q. A person placed on the tug or carfloat would have seen the *Bretagne* on the starboard bow of the tug or carfloat? A. No, sir.

Q. Would have seen her on the port bow? A. Yes, sir.

Q. Is that what you have indicated in Claimant's Exhibit A? A. Yes, sir.

Q. Which side of the carfloat did you see when
280 you blew your first signal of one blast? A. I saw the starboard side of the carfloat.

Q. Doesn't it follow from that that the person on the carfloat would see you on the starboard bow? A. No, sir, not necessarily.

Q. You don't consider that? A. No, sir, I do not.

Q. In the position in which the tug and carfloat were when you first blew your whistle it would

have been necessary to port the tug's wheel in order to point directly towards you? A. No; all she had to do was to port her wheel half a point, or a point, and come parallel with us; that is, pass to the eastward of us. 281

Q. The tug and carfloat were approaching so as to point to the westward of your vessel at that time? A. Yes, if they went on their course.

Q. How much from that position which the tug and carfloat were in at that time would she have had to swing her bow to eastward in order to point straight at you? A. She was pointing almost to me. 282

Q. But you have just stated that she was pointing to the westward of you; how much would she have had to alter her course in order to point straight for you? A. Probably half a point; say half a point or a point; half a point heading southward, we will say one point, or less than a point, would have cleared us; passed to the eastward of us. 283

Q. How far would you say the tug and floats were when you blew that blast? A. The first time? Nearly one mile.

Q. Does a mile express it as nearly as you can? A. It would be very few feet less than a mile.

Q. As I understand your testimony the next thing that happened was the tug and floats altered their course so as to head to the eastward of you? A. Yes; not off, but parallel with us, so she would pass us to the eastward. 284

Q. So as to show you a red light only, if it had been night? A. Exactly.

Q. When the tug and floats reached that position how far from you would you say they were? A. Well, then they were—oh, it might have been three-quarters of a mile then.

Q. How did they bear from you at that time? A. Well, they were to the southward of the way we were heading.

285 Q. On your port bow? A. On our port bow.

Q. How many points, or fractions of a point, were they on your port bow? A. They were not over half a point.

Q. Up to that time had you given any order to the engine? A. Yes, we had been going slow previous to that, and gave the order of half speed.

Q. You have testified that from the time of pass-
286 ing Castle Garden you were running under the order half speed; was that usual? A. We were going slow and half speed; we were proceeding cautiously.

Q. What order stood on your telegraph when you first saw the *Narragansett?* A. Half speed.

Q. Did that order continue to stand on your telegraph when you first saw the *Narragansett?* A. Half speed.

Q. Did that order continue to stand on your
287 telegraph up to the time when you say she straightened up and showed you her port bow and assumed a course parallel with yours? A. When I saw her heading the way she was, I blew one whistle and slowed; when the *Narragansett* ported a bit, showing everything was clear for us to pass to the westward of them, then we went half speed again.

Q. So you slowed your engines immediately after blowing your first blast on your whistle; was that right? A. Yes.

288 Q. What was the meaning of that one blast of yours? A. To indicate that we would pass to the westward of him.

Q. What does the rule say on that subject; are you familiar with the rule? A. The rule says when one whistle is blown it shall be answered by both ships.

Q. Doesn't it say that one whistle means I am directing my course to starboard? A. Yes, under a port helm.

289

Q. Did you give a porting of the helm at that time? A. Yes, sir, just a slight touch.

Q. So that when you blew your first whistle signal you followed it immediately by an order to port the helm and an order to slow the engines? A. Yes, to make sure that he would answer, or signify that he understood us.

Q. I am asking about what you did right away after the first whistle signal; it was port the helm 290
and slow the engines; is that correct? A. You ask so many questions the same way; I told you direct that we were going half speed, and when I met the *Narragansett* heading a little to the westward of our opposite course I slowed and blew one whistle; she didn't answer the whistle, but sheered to starboard, indicating that everything was clear, and we went half speed.

Q. You have left out the point of my inquiry. I am asking about the porting of your wheel; I 291
want to know whether upon blowing that first whistle signal you ordered the wheel ported and slowed your engines? A. I ported, yes.

Q. Was the order obeyed? A. The ship's head went to starboard, yes.

Q. How much did she swing under that order? A. Very little; probably it wouldn't be an eighth of a point; a quarter of a point at the most.

Q. What order did you then give to the helm, if any? A. Steady.

Q. How long after that was it that you saw the 292
tug and tow assume a position parallel with yours? A. Well, it might have been—it wouldn't be half a minute; it wouldn't seem to be much longer.

Q. In the interval between the first whistle signal and the tug and tow assuming a position of parallelism with your course you slowed your engines, you were ordered the helm ported, and you ordered the helm steadied? A. Yes.

293 Michael Sullivan.

Q. Did anything else happen in that interval? A. No.

Q. When you saw the tug assume this position of parallelism did you give the order full speed ahead to the engine? A. I did for a moment.

Q. How long did you continue the engines full speed ahead before you gave any other order? A. It wouldn't have been a minute, at the ex-
294 treme.

Q. Then what order did you give to the engines? A. Slow.

Q. Not half speed? A. No; slow.

Q. Slow ahead? A. Just slow; slow ahead.

Q. Up to this time you hadn't blown your whistle again? A. Well, not till I saw him sheer again to the westward.

Q. When you gave this order to slow were the tug and your ship still on parallel courses; had you seen any further change of course on the part
295 of the tug? A. Yes.

Q. Before you gave the order to slow? A. Not before; as soon as I saw the tug sheer to the westward I slowed at once.

Q. Then, as I understand, upon seeing the tug take a parallel course the first order was a full speed ahead order? A. When everything was clear.

Q. And when you thought things were clear, you kept them so for about how long? A. Prob-
296 ably a minute.

Q. Was your helm then amidships? A. No; steady; going along steady.

Q. Then the next thing you saw the tug sheer to the westward? A. Yes, sir.

Q. And upon that what did you do? A. Slowed and blew one whistle.

Q. Both at the same time? A. Within a time as quick as possible.

Q. When you gave that order to slow, and blew

that one whistle how far distant was the tug, as well as you can tell? A. Well, she was probably half a mile.

By the Court:

Q. Had she broadened any on your port bow? A. Not at all.

By Mr. Brown:

298

Q. How did she bear from you when you first saw her begin to sheer? A. She was a little on the port bow.

Q. Half a point on the port bow? A. Not as much as that.

Q. An eighth? A. Well, probably, yes.

By the Court:

Q. Did she get to be any more than that? A. No.

299

By Mr. Brown:

Q. When you gave that order slow to the engine and blew your whistle were the tug and tows still showing their port side to you? A. Well, they were almost end on.

Q. They had sheered enough to present an end on view? A. Yes, sir, so I could see right between them.

Q. You hadn't noticed when they began to sheer, but not until they began to point straight for you? A. I could see when he had his wheel to port, in looking through this alley way.

300

Q. Did the tug have his wheel to port? A. I don't know how he had his wheel.

Q. Did you see when the tug began to sheer, still presenting his port bow to you? A. No, he didn't come as far as that the second time.

Q. You have testified that after your first blast of the whistle he changed so as to show you his port bow? A. Yes.

301 Michael Sullivan.

Q. Afterwards he sheered again to the westward? A. Yes.

Q. There must have been a time that he began to sheer when he was showing his port bow, that if you were watching you could have seen it? A. I can't answer that.

Q. Did you see anything to indicate a sheer on the part of the tug and floats until they had turned
302 enough to be pointing straight for you; can you answer my question? A. No.

Q. Did you have any person posted as lookout? A. Well, there are always competent officers on board those ships.

Q. Did you have any person charged with the duties of lookout? A. No, I didn't.

Q. Was any person charged with those duties as far as you know? A. Yes.

Q. Whom? A. The chief officer, always.

Q. Did he make any report to you? A. No, sir.
303

Q. When the tug and carfloats had sheered enough to the westward to be pointing straight for you, you then ordered slow to the engines? A. Yes.

Q. And blew a second blast on the whistle? A. That was the first blast; that is when I saw them first they were headed a little to the westward of me; I slowed and blew one blast of the whistle.

Q. I have passed by that point; you have stated that they swung to the eastward and took a posi-
304 tion of parallelism to yours, and then swung to the westward. Coming up to that point did you wait until they were pointing straight for you and then give an order slow to the engines, and blow your whistle a second time? A. The second time I slowed down.

Q. Is it true? A. I can't understand what you are getting at, at all; I don't understand that point of navigation.

Q. When you blew your second blast, were the

tug and carfloats pointing straight for you? A. No; they were heading a little to the westward of me. 305

Q. So that they were already presenting their starboard bows to you? A. Yes, showing a little of the starboard bow.

Q. When you ordered your engines slowed, were they also showing their starboard bow? A. No, they had come up head at us. 306

Q. Which came first, your second whistle or your order to slow the engines? A. The first whistle.

Q. I said second whistle? A. The second whistle they never showed their port side at all.

Q. What were they showing at your second whistle? A. When I blew the second whistle I slowed and stopped, and they were coming parallel—that is, coming right at the ship.

Q. Pointing straight for your ship? A. Yes, sir. 307

Q. So that you would have seen red and green, if it had been night? A. Yes, sir.

Q. It was at that time that you ordered your engines slow? A. Oh, no; before that.

Q. When did you order them slow the second time? A. When I saw her take the sheer to the westward.

Q. But you have testified that as soon as you saw them sheer to the westward you blew your whistle the second time? A. Exactly. 308

Q. Do you wish to retract from that position? A. Not at all.

Q. That is true, isn't it? A. That is true.

Q. You say at that time they were pointing straight for you, and would have shown red and green lights, if it had been night; do you say that still? Do you wish to retract from that? A. Let me understand; when the second whistle was blown——

309 Michael Sullivan.

Q. What is it that you don't understand? A. About the tow coming right at us.

Q. Is it true that when you blew your whistle the second time they had sheered enough to be pointing straight for you? A. Yes.

Q. And were half a mile away? A. Not quite, because the ship was going ahead.

Q. How far were they away at the second blast
310 of your whistle? A. Oh, yes, half a mile away.

Q. What next happened? A. We stopped and reversed.

Q. Was that at that time part of the same order? A. Within half—— yes; stop—— we let her way run off seeing that the float would sheer enough to the eastward of us to clear him.

Q. How long were they stopped before you gave the order to reverse? A. Less than a minute.

Q. Upon the sounding of your second whistle
311 signal did you give any order to the wheel? A. No.

Q. None whatever? A. Well, I don't remember that; she might port a little.

Q. How much did you swing under that second order to port? A. Not much; she might swing an eighth of a point.

Q. You don't think more than that? A. No.

Q. Was that order "port" "a little port" or "hard-a-port"? A. Just port.

Q. Transmitted by the captain? A. Yes.

Q. When you stopped your engines how far was
312 the tug and carfloats? A. Well, they were less than half a mile away.

Q. Can you give it any more exact than that? A. Well, pretty close.

Q. Was it more than a quarter of a mile? A. Yes, it was more than a quarter of a mile.

Q. How about the time when you reversed; were they then more than a quarter of a mile away? A. No; they were coming together.

Q. When you reversed how far was the tug from you, do you think? A. Well, they would be an eighth of a mile then.

Q. When you stopped your engines how was the tug and carfloats bearing from you? A. They were directly ahead.

Q. Dead ahead; when you reversed how were they bearing from you? A. Right ahead.

Q. When the tug and carfloats sheered to the 314
westward, after having been in a position of parallelism, how much in your judgment, did they turn on that sheer? A. Just enough to show a little of the starboard side.

Q. How big a turn do you think they made; can't you state in points? A. They were so close together——

Q. But you say half a mile apart; that isn't very close together? A. It is for water, that is for navigation.

315

Q. Can you tell me about how many points they turned? A. Oh, half a point would follow the sheer of a vessel a great deal in that short distance.

Q. Is it your judgment that they turned only half a point? A. I wouldn't say that; I would say one point.

Q. You think that is all they sheered to the westward? A. Probably that is all.

Q. And that was enough to show their starboard bows to you? A. Yes, it was.

316

Q. Had they sheered any more than that when you reversed your engines? A. It made quite a difference; we hit her then.

Q. Try and answer my question. How much had they diverged at that time when you reversed? A. I don't know.

Q. You have no judgment on the subject? A. No.

Q. What was the direction of the set of the

317 Michael Sullivan.

tide at the time of the collision? A. About parallel with the channel; about SW by S.

Q. You made a statement to the Pilots' Inspectors about the collision, didn't you? A. Yes, sir.

Q. Did you make the following statement to them about——

MR. JONES: I object; let the statement be put in.

318 THE COURT: He can cross-examine about the statement, if he wants to.

MR. JONES: I object, unless he produces the paper.

THE COURT: I have the paper in my hand.

MR. JONES: I object. The paper is resorted to as an admission of the witness, and the admission must be taken in its en-

319 tirety in order to be fair to the witness.

THE COURT: That is undoubtedly true, but this is cross-examination; you can put the paper in, if you want to.

MR. JONES: I may not want the paper.

THE COURT: He can ask any question that he likes in cross-examination, and you can take any further steps you choose to protect yourself.

MR. JONES: excepts.

320 Q. Did you make the following statement:

About 10.40 A.M., a tow of two carfloats being on my port bow half a point went up, I sounded one blast. We were going half speed or 8 to 9 knots; no reply, but she, the tow, changed position so I thought she ported."

Q. Did you make that statement? A. Exactly.

321 Q. Can you explain why in you report you only say you thought the tow ported and said nothing at all about her changing her course enough to show her port side, whereas she had previously shown her starboard side? A. She did show her port side.

Q. My question seeks for an explanation. A. I might have omitted that in giving the statement to the secretary.

322 Q. Can you explain why you speak so doubtfully in your statement, and put it only that you thought she had ported, and don't say that you saw she had ported? A. They are wording it right, probably.

Q. Did you then immediately afterwards in your statement, say "I ordered full speed ahead; all appeared to be clear?" A. I did.

Q. Is that you testimony, that you ordered full speed, or that you ordered half speed? A. Full speed.

323 Q. Which vessel blew the alarm whistle first? A. The *Narragansett.*

Q. Under what order were your vessels working when the *Narragansett* blew her alarm? A. Full speed astern.

Q. And had been how long? A. Some time; oh, I don't know; enough to take the way off the ship so as to check the blow.

Q. Give your best judgment as to the length of time? A. Oh, probably we had been going astern 324 in the neighborhood of a minute.

Q. How far apart were the vessels when the alarm was sounded by the *Narragansett?* A. Oh, she was very close, we were going astern at the time; she wasn't two ship's lengths off, say a thousand feet.

Q. Did you make the following statement:

"The tow sheered to the westward again; I ordered the engines slowed and gave one

325 blast, when tow straightened up and came right for us and gave the alarm whistle; we reversed full speed and blew the alarm signal."

A. Yes, I did.

Q. How can you explain it that in the statement to the Pilot Commissioners you say that you re-
326 versed full speed, after speaking of hearing an alarm from the *Narragansett?* A. Well, we give it as short as possible; they just put in a record of the happening.

Q. Didn't you intend, in your account, to describe correctly the order of events? A. I did, in short; very shortly.

Q. You intended to describe the order of events? A. Well, that was necessary.

Q. But you have no explanation to give why
327 you didn't give the orders correctly to the Pilot Commissioners? A. That is correct.

Q. Is it correct that after you heard the alarm you reversed full speed? A. No; we had been going astern when the *Narragansett's* alarm blew.

Q. But your statement says "the tow straightened up and came right for us and gave the alarm whistle"? A. We had been stopping going astern then; she was reversed.

Q. So you had previously been reversed and you reversed again? A. No.

328 Q. You have no further explanation that you can give about the order of describing the events than given to the Pilot Commissioners? A. The only thing is that we slowed and stopped and reversed; we were going astern when the *Narragansett* blew his alarm whistle; we did everything to avoid her.

Q. Why didn't you blow some whistle when you reversed your engines? A. We were giving the other ship a chance; I had my hand on the cord about the time when the *Narragansett* blew.

Q. You don't claim that you blew your alarm whistle till after the *Narragansett* blew hers, do you? A. I do not; she never answered any of my whistles. 329

Q. You know the law requires you to give a signal to show that your engines are reversing when you put them astern? A. Not always; if a vessel is coming astern of you, or to avoid a collision. 330

Q. Are you ignorant of any rule to give a reversing signal when you reverse? A. It is not necessary at all times.

Q. I am talking about the rule; are you familiar with the rules? A. At all times——

Q. Isn't there such a rule? A. Yes.

Q. Did you obey that on this occasion? A. I did.

Q. Did you give any signal when you reversed? A. No, I did not; when I did reverse I had hold of the whistle cord. 331

Q. How long did you wait after reversing before you gave any signal? A. Probably ten seconds or fifteen seconds.

Q. You have already testified that one minute before you reversed you heard an alarm from the *Narragansett?* A. No, sir.

Q. What do you intend to testify? A. I said the ship was going astern fully a minute.

Q. Do you make any distinction between the ship and the engines going astern? A. I meant the engines were going astern. 332

Q. You didn't blow your alarm till after the *Narragansett* blew hers? A. They were so close together; they were a second apart.

Q. When you gave your first whistle signal of one blast you didn't consult the captain of the ship, did you? A. No.

Q. As soon as you had given it didn't he come

333 to you and protest about your having done so without consulting him? A. No, I don't remember such a thing.

Q. Don't you remember any remonstrances on the part of the captain against your method of navigating that ship? A. No, I do not.

Q. Isn't it a fact that your course on your port bow was less obstructed than on your starboard
334 bow at that time? A. Yes—well, no; of course there were other tows to the eastward of me.

Q. Did you see the tug *Tice?* A. I didn't know the name of the boat.

Q. Did you see a tug carrying two canalboats or towboats on her port side and one on her starboard side? A. Well, I saw the tug coming up, with canalboats alongside; I didn't notice how many she had.

Q. Where was that tow when you blew your
335 first blast? A. A little to the eastward of the *Narragansett;* almost astern of her.

Q. How far from you? A. Well, she would be a little further.

Q. As much as a mile? A. Yes, she was a mile.

Q. Was she on your port or on your starboard bow? A. On the port bow.

Q. How much? A. She was a full point, nearly; she was so far on my port bow that I didn't pay any attention to her, as everything
336 was safe for her to pass to the eastward of me.

Q. As soon as you blew the blast and gave the order to port the wheel, didn't you soon afterwards, upon the request of the captain, give the order steady and stop? A. About stopping, I don't remember anything about that.

Q. Didn't you give the order steady on account of his remonstrances? A. No, I can't say that I did.

337

Q. Didn't he ask you to stop the engines? A. No, he never did; not when I blew the first blast.

Q. When you blew your signal the second time, didn't the captain remonstrate with you? A. No, I can't say he did.

Q. Tell all that was said between you and the captain from the time you first sighted the *Narragansett* up to the time of the collision? A. We had no conversation at all.

338

Q. None whatever? A. I can't say what conversation we had; not in regard to navigating the ship.

Q. No other conversation except as to indifferent subjects like the weather? A. Nothing that I know about; nothing whatever.

Q. Don't you know that the captain has condemned your navigation on this occasion? A. No, I do not.

Q. Did you assist the captain to make his report about this collision? A. None whatever.

339

Q. You haven't seen his report at all? A. Never saw it till he gave me a report, to bring back to the office; but I had no way of making it out, or assisting in making it out.

Q. On the morning of the 17th of March, had you been in the saloon before going on board the steamer? A. Not to my knowledge.

Q. Are you a member of any organization that makes a practise of celebrating St. Patrick's day? A. No, sir.

340

Mr. Jones: The full report of the pilot is offered in evidence, subject to corrections, if found to be inaccurate.

It is marked Claimant's Exhibit D of this date.

Re-Direct Examination by Mr. Jones:

Q. In going out and coming into port in clear weather do you navigate by the headlands and highlands, or by compass? A. By headlands.

341 Q. The compass being resorted to in case of bad weather, when you can't see the headlands? A. Yes.

EUGENE PONCELET, being duly sworn and examined as a witness on behalf of the claimant, 342 testifies with the aid of an interpreter:

By Mr. Jones:

Q. Where do you reside? A. In Paris, usually; my home is in Paris.

Q. You are the commander of one of the ships of the Campaigne Generale Transatlantique? A. Yes, sir.

Q. What is the steamship? A. The steamship *Lorraine.*

343 Q. You commanded the *Bretagne* on the day of the collision with the tug *Narragansett* and her carfloats? A. Yes, sir.

Q. What experience have you had as a navigator? A. I have served in the French Navy for twenty-three years; I left it as Leftenant Commander, and I am in the French Line service for seven years; I have been in command of two French men-of-war and five French liners.

Q. Coming down to the day of this collision, without going into every detail, just state what 344 you saw and what you heard and what happened after your attention was called to the *Narragansett* and her carfloats? A. About abreast of Ellis Island we sighted two convoys of carfloats a little bit on our port bow; the first was composed of one tug and one or two carfloats; we could not see the tug; it was on the east side of the carfloats. For myself, I never saw the tugboat, and I thought that there was only one carfloat showing to us its starboard side; the second convoy was of one tug

and two scows in tandem, a little bit more on our port bow, and further to the south; the first carfloat was about one mile away. We were heading at that time in the direction of the channel, to the west side of the channel, and pretty close to the shoal ground, and barges and steamers anchored, and we were going since one moment about half speed; but a little bit before we had stopped and were going slow; then our speed was very small, very, very small; the pilot Sullivan gave one blast himself, and said "Port," as in French the orders are not given to the helm, but to the gear, we translate usually the English orders in French orders, and I did; also the first Leftenant, who was on the bridge, and we said "Tribord"; that means to put the helm on port; and I asked immediately the pilot "Why do you come on starboard," thinking that perhaps we had some room to the left side of the channel, but knowing that it was not right the maneuver to make, because I saw the first carfloat and tugboat on my port bow, and showing to me its starboard side, then crossing our bows, and looking as if they were trying to go to the western part of the channel, the pilot answered me "All right, captain" and said "Steady," I think that at this time, on account of our slow speed—and the *Bretagne* is a very long steamer, very narrow—we had not swung to the west more than two or three degrees; but we had showed our intention by our whistle to swing to starboard or keep to the right side of the channel; none of the carfloats or tug answered to our signal, and we were myself, two officers, and about six or seven quartermasters on the bridge; and the quartermasters at the wheel; none of us saw the steam from the whistle of the tugboat or heard the sound——

345 346 347 348

Mr. Brown: I should like to have the wit-

349 Eugene Poncelet.

ness instructed to confine himself to what he saw, and move to strike out that "none" of them saw.

THE COURT: Motion granted.

A. (continued) :Then I think that at that time our speed was not very strong, very great, and about —I don't know how many minutes, but two or
350 three minutes perhaps after the first whistle the Pilot Sullivan gave another blast, and ordered again "Port." I asked the same thing; he answered me "All right" and stopped. No answer from the tugboat; well, thinking that they did not get a good lookout on board the tugboat and carfloats, that perhaps it would be too late to avoid the collision, we said—the Pilot Sullivan and myself—at the same time, "Full speed astern," because we had not got any answer from the tug, and they were always crossing our bow, showing
351 the starboard side. We were pretty close to the shoal ground; the engines were reversed full speed and our engines worked very well, and we repeated the order full speed astern many times; and the telegraph indicated that the order was well known, was well received, and also a man spoke by the speaking tube, saying in French "Full speed the quickest" (le plus vite en arriere), the quickest possible astern, by the speaking tube; we were at this time about 200 yards.
352 About in the same time, but I can't recollect exactly if it was one before the other one, but it was a question of seconds, the pilot gave three or four short blasts indicating that we were going astern; the tug gave the same signal, but she came all the time to port; and when we struck her we were almost perpendicular to her, our bow striking the carfloat *No. 160N* about at one-third of its length from ahead, but our speed was certainly very

small at this time because from what we could see we tore off only a little bit of wood, and we saw the cars falling in the water. Perhaps if the cars had been tied more strongly in their rails they would not have gone into the water, but our speed was very small. If it had been great the *Bretagne,* which was 11,000 tons, would have cut in two the carfloats and tug. I must certify in resume that I saw always the tug on our port bow, 354 that we came on starboard after blowing the whistle at first, that our speed was very small, and that we did not back astern only when we saw that by the wrong maneuver of the tugboat collision was almost unavoidable.

Q. Did you observe, after sighting the carfloats, any change of their course as you first noticed it? A. The change was so small that I said I could never notice if there were two carfloats or one; I thought that there was only one 355 car-float on the starboard side of the tugboat.

Q. You didn't notice any change of their situation with reference to the ship from that? A. Our course was changed very little.

Q. I am speaking now of the course of the carfloats? A. It looked to me that the carfloat changed its course to the west, because it looked to me to be about seen under the same angle from our port bow. We had changed about perhaps half a point to starboard, and I think I saw some time after the carfloats on the same bearing from 356 my bow.

Q. Can you tell us from your recollection of the occurrence now who it was on the bridge that first sighted the tug and the carfloats? A. don't know; perhaps the pilot, and perhaps I, perhaps both at the same time.

Q. You can't recollect now the order of events? A. No, because we were so many on the lookout that would see, the weather was clear and we all

357 kept a very sharp lookout, and I can't say who sighted the carfloats first there were so many carfloats in the river, and a ferryboat on our port bow, two or three tugs, schooners, as many things as are usually in the river; but we sighted, the pilot and myself, the carfloat about the same time, certainly.

Q. Do you think that the pilot is mistaken in his
358 statement that after the tugboat *Narragansett* and the carfloat were discovered, they changed their course and straightened down on a parallel course with yours? A. It is possible that the pilot should be right and I should be wrong, because certainly he is more used than I am to look, to see the carfloat and the tug, and he could detect when I could not that a carfloat has made some change in its course. For me, I never saw the tugboat.

359 Q. How many officers did you have on the bridge? A. Two officers on the bridge.

Q. And how many quartermasters? A. Six or seven.

Q. And the ship is steered by steam? A. The ship is steered by steam, and it is very—the head is reversed very quickly, in ten seconds.

Q. And the pilothouse is on the bridge? A. The pilothouse is on the bridge.

Q. Did you have any men on the lookout? A.
360 On the lookout there were the captain, two officers and six men on the bridge; it is their duty to be on the lookout when we leave port or when we go into port; when we are at sea we have two men in clear weather in the crow's nest but we have none in the crow's nest in the harbor.

Q. State whether or not you saw any lookouts on the tugboat or the carfloats before the collision? A. We saw no man on top of the cars; I saw no man on the top of the cars; I saw one or two about the time of the collision when we were

backing astern, and after the alarm signal. Usually there is always one man on the top of one car. I suppose it is so because the pilothouse of the tugboats are very little above the roof of the cars, but at this time I saw nobody.

Cross-Examined by Mr. Brown:

Q. At the time of the collision there were no persons posted at the stem charged solely and 362
exclusively with the duties of lookout, were there? A. There were about thirty men on the stem; the first officer, what we call in French the second captain, with an auxiliary officer who has not got his license.

Q. I inferred from your answer to my question that there was no one person forward on your ship charged with the duties of lookout? A. Yes, sir; I said that there was on the forecastle the second captain and the auxiliary officer and about 363
thirty men; but the second captain is ordered to show me—in day time he has nothing—to show me on the bridge if he sees anything right ahead.

Q. When the second captain stands forward on the forecastle do your standing orders require him in the day time to call your attention to any object he sees forward? A. Yes; he does it by a sign, and if I do not see, he has a horn.

Q. On the morning of this collision did the second captain or did any body else make any 364
report to you on the bridge by gesture or by word of mouth? A. He did, himself.

Q. What was his report? A. With his hand.

Q. When did he do that? A. Well, after—when we sighted—at the same time we sighted the carfloats.

Q. Was that after your first whistle signal had been blown or before? A. Oh, before.

365 Q. Had you already seen the carfloats at that time? A. Yes.

Q. How long had you noticed the carfloats before the pilot blew his signal? A. I don't know; perhaps five or six minutes; we were swinging in the channel and when we came from the mouth of the North River, according to the channel we were swinging to the SW.

366 Q. During those five minutes before you sounded your whistle, your ship was on a swing, was she not? A. About; I can't tell.

Q. She was swinging towards the starboard? A. She was going out from the North River; she was rounding the Spar buoys and she was taking the Southwest Channel.

Q. The objects that you were rounding were on your starboard hand, were they not? A. Yes, but it was before being in the Southwest Channel.

367 Q. I am talking at present about the five minutes that you say the tug and carfloats were in view before the pilot blew his first whistle; now, I understood you to say that during those five minutes your ship was on a swing; did I understand you rightly? A. Just a little bit; yes, certainly.

Q. That swing was a swing toward the starboard, was it not? A. Yes, sir.

Q. Were you still on that swing when the pilot blew his whistle? A. No, we were steady. We were straight in the direction of the channel.

368 Q. In those five minutes how much do you think your ship changed her head on that swing to starboard? A. Perhaps one point.

Q. At the end of that period of five minutes, namely, at the time the pilot blew his first whistle, the carfloats and the tug *Narragansett* as I understand you were half a point on your bow, was that right? A. About.

Q. And they were resenting their starboard sides to your view? A. Yes, sir.

Q. I show you a drawing intended to indicate the position of the vessels at that time, namely, when your first signal was blown. This has been drawn by your third engineer, Mr. Roch; I wish to ask you whether you have any criticism to make of the correctness of that diagram; just draw in pencil anything to supplement or correct this diagram that you desire, bearing in mind always that this indicates the position when your first whistle signal was blown? A. I should put the carfloats a little more nearly ahead of the *Bretagne.*

Witness places models.

Q. Have you put them as you desire to have them? A. Yes, sir; about; it is a question of direction, but it is very difficult to tell.

The witness draws on Claimant's Exhibit 1 of April 11th, 1906, two diagrams representing two tugs and their tows, the one tug and tow being designated by the letter "N" and the other by the letter "T."

The witness states that the one designated by the letter "N" was the tug and tow with which he afterwards collided.

Q. Do you know the identity of the other tug and tow? A. No, sir; I saw it pass after the collision on our port side.

Q. In drawing your diagram marked N have you attempted to indicate the bearing on the starboard of the tug and float that your steamer at that time would have been seen, as nearly as you could? A. Yes; but it is very difficult to know exactly at a distance how many half points a bearing differs from another bearing; then I think that the bearing of the *Narragansett* was about

373 Eugene Poncelet.

between half a point or a point of my port bow and that she was heading about half a point or a point to the westward of my course.

Q. Aren't you satisfied with the position which you have drawn of the carfloats and the tug? A. Yes, I am; because the position shows that I saw the *Narragansett* off my port bow crossing my way; and that I could see the other tow on my
374 port bow and east of the *Narragansett*.

Q. Your diagram shows that you could see only the starboard side of the starboard floats; that is correct, isn't it? You did see it so? A. That is what I have always said; I could never see the tugboat.

Q. Drawing it as you have done, so as to see only the starboard side of the starboard carfloats, you will notice that a straight line drawn from the floats to your vessel would be about three points
375 or something like that, upon the starboard bow of the floats; do you think that is about correct?

Mr. Jones: I wish to have it noted that the diagram is not exposed to the attention of the witness but is concealed by a sheet of paper.

The Court: I do not see how that piece of blotting paper conceals anything.

Mr. Brown: I want it to indicate a straight line; I thought that would help the
376 witness to show the premises of my question.

A. I have said already that the bearing of the tow was between half a point or a point on my port bow.

By the Court:

Q. That isn't the question; it is the question of the bearing of your vessel from the tow. A. I

have said already, that the course of the tow, in my opinion, was about half a point or a point west of my course.

Q. The question is what was the bearing of your vessel from this tow? A. I am a bad draftsman.

Q. There isn't any question of drafting here; the question is how much was your vessel on the starboard of this tow, about? A. About one point.

By Mr. Brown:

Q. Don't you think that if the carfloats had been heading within one point of the position of your ship at that time that you would have seen the tug between the floats? A. No, sir; because the tug was always tied to the after part of the carfloats which were much longer than the tug, much higher usually, and then it is not surprising that you could not sight the tug between her two carfloats.

Q. Did you not discover when the collision occurred, that this tug had a second carfloat in tow on her port side? A. I discovered it only when the second carfloat parted from the tug.

Q. Previous to that time you are quite sure, are you not, that it was not in your range of vision because concealed by the nearer carfloat? A. Exactly.

Q. You are sure of that, are you? A. Exactly; in my opinion.

Q. You have no doubt on the subject, have you? A. I have no doubt about that; until after the collision.

Q. From the time you first saw these carfloats up to the time of the collision your attention was directed to them; you were paying sharp and careful attention, were you not? A. Exactly; I did; I paid special attention to that carfloat; not forgetting the other tug, barges, steamers, and ferryboats going down the river.

381 Q. During all of that time it was only the starboard side of the carfloat that was exposed to your view; isn't that so? A. Yes, sir.

Q. You are positive of that, are you not? A. Yes, sir.

Q. And during none of that time was any part of the port carfloat exposed to your view at all? A. I never saw any.

382 Q. You were looking? A. Oh, certainly.

Q. You would have seen it if it had been in sight? A. Yes, I was looking at this carfloat, but I was looking too to my starboard side, behind us, for the other steamers going up or down, especially a German liner which was very close to us.

Q. During the time that you were watching the tug and floats was there any change of course on their part that you could see? A. In my opinion there was.

383 Q. Was that a change to the westward or a change to the eastward? A. To the westward; because we had changed our course by half a point, and it looked to me that the carfloats were on the same bearing on my port bow that they were before.

By the Court:

Q. That bearing never changed at any time? A. In my opinion the bearing was always the same on my port bow.

384

By Mr. Brown:

Q. There was a time when the carfloats got to a point directly ahead of you, was there not? A. Yes; when we got pretty close.

Q. You are sure, are you not, that there never was any turn on the part of that carfloat towards the eastward? A. In my opinion I never saw it swing to the east; I never saw it; if it did, as I have said before, it did very little.

385

Q. Too little to notice? A. Yes; but I don't think it did.

Q. Before the time when the whistle was first sounded on your ship to the *Narragansett* did you have any conversation with the pilot about the manner of passing the *Narragansett?* A. Yes.

Q. What conversation did you have? A. I said after the first whistle——

386

Q. Before the pilot blew his whistle was there any conversation? A. It is possible.

Q. Do you remember? A. Oh, no; but I am sure that I showed him some vessel, some ferryboat, calling his attention to some special boats, asking him what he——

The question is translated by interpreter.

A. Oh; no, sir.

387

Q. When your ship has a pilot on board is it your practice, if the maneuver initiated by the pilot is a dangerous one, to intervene and countermand it? A. If I thought that a maneuver ordered by the pilot was dangerous, I think I should be a bad captain if I did not disobey his orders, and I should be condemned by the French law; but it was not the case.

Q. At the time when the pilot blew his whistle to the *Narragansett,* isn't it true that you had more space of water on your port bow to navigate in than on your starboard bow? A. Yes; it looked to me so, at first; but after having asked the pilot why do you come on starboard, I thought that it looked that there was some room, but there was no water—there was shoal ground.

388

Q. There was no shoal ground on your port bow? A. No; but I thought also that he was right; but I had no time to speak to him, and I would not speak; I thought also that if he had come on his port hand he would have met the other tow.

Q. At the time when your whistle was first

sounded to the *Narragansett*, was it your opinion, as a navigator, that it was the part of prudence for you to allow the tug and carfloats to cross to your starboard side, starboarding your wheel, if necessary? A. No, sir; it is contrary to the international and inland harbor rules.

Q. I wish you would try to answer my questions, without going beyond them; I am asking your
390 opinion only? A. Yes; my opinion is——

Q. You think the pilot's maneuvre was proper? A. Certainly; but I asked him what I have said before; I asked him what he was doing.

Q. When the pilot blew that blast of the whistle weren't you, as matter of fact, surprised at the course he took? A. Yes. I have said why, before.

Q. Weren't you surprised or astonished that he assumed to go to the westward of that tug? A. As I said, yes; I was surprised, as I have said be-
391 fore.

Q. You have answered the question. Don't go into anything else.

THE COURT: Do you want to qualify your answer?

THE WITNESS: No.

Q. Didn't you regret the signal that the pilot gave? A. Yes, I did, at first.

Q. Didn't you foresee the danger of the signal
392 that the pilot gave? A. Yes; because I thought that, as usually, the carfloats would not do the right thing.

Q. You still think that the whistle, given by the pilot, at first was a dangerous thing to do? A. No, not a dangerous thing.

Q. On the 26th day of March, 1904, nine days after the collision, you made a report to your Company, about it, did you not? A. Yes; but I don't remember the date.

Eugene Poncelet. 393

Q. Didn't you make such a report upon your arrival in Havre? A. Yes, sir, I am obliged to, by law, and did so.

Q. Wasn't it your opinion at the time you made that report that the pilot's maneuver was a dangerous one to be adopted? A. I thought that perhaps it would have been dangerous; if I had been perfectly sure that the other tug, the second one, would that have crossed our way, if we had 394 come on our port hand; but secondly, I thought that Pilot Sullivan's maneuver was perfectly right, according to the rules.

Q. Didn't you, in making yaur report to your office state that you regretted the inopportuneness of the signal the pilot had given, and didn't you also state that you foresaw its danger?

MR. JONES: I object to the report being used in this way, without being produced.

THE COURT: I will allow it. 395

Mr. Jones excepts.

MR. BROWN: You can offer it.

MR. JONES: Of course I will offer it, if you produce it.

Q. Since the making of that report have you changed your opinion as to the danger of the course the pilot took? A. I have not changed my opinion, but if you read the end of the report you will find what is exactly and what was exactly my 396 opinion.

Q. Your opinion not having altered you still have the same and think that that was a dangerous maneuver for the pilot to take, do you not? A. At first, yes, sir.

Q. When you say "at first" you mean the maneuver he took at first was at that time a dangerous maneuver? A. I thought so at first.

397 Q. That doesn't seen to be consistent with what you have just said; you stated in your report, nine days after the collision, that the pilot's maneuver was a dangerous one. A. Yes; I thought at first, but read the end; what follows.

Q. Was it your opinion at the time you made this report that was a dangerous maneuver? A. At the time of the first whistle I thought it was
398 a dangerous maneuver, yes.

Q. Try and answer my question; I am asking for your opinion at the time you made this report? A. When I made my report I said in my report that the opinion I had at the time of the collision, and which is mine two years after; I said that at one moment I thought that it was a dangerous maneuver, but about at the same second I thought the maneuver was all right.

Q. You have not answered my question; I have
399 asked for your opinion at the time you made this report, and I now ask you whether you can recall what your opinion was at that time, as to the danger or safety of the maneuver the pilot took? A. At the same time I thought it was a dangerous and a safe thing.

Q. I shall be very interested to have you enlarge upon that a little bit, and show in what respect it is dangerous and in what respect it is safe. A. I thought at first it was dangerous, because I thought, as I have said before, that the
400 tugboat would not do the right thing; that is, swing to starboard; but at the same moment I thought that on whistling one blast and keeping the right side of the channel we were exactly obeying the rules.

Q. On the 26th, of March was it your opinion that the maneuver of the pilot was safe or unsafe, if you know; that is, the day this report was made? A. I thought at first that he had obeyed perhaps too strictly the rules; but I thought he had obeyed the rules, yes.

401

Q. Can't you answer my question exactly? A. I can't answer more——

Q. You mean you don't remember now what your opinion was at that time? A. Oh, yes, I remember exactly.

Q. Then tell me whether your opinion at that time was that the pilot's maneuver was a safe one or an unsafe one? A. I said perhaps he kept too strictly the rules, but that he obeyed them.

402

.Q Didn't you think at the time that it was unsafe to obey the rules so strictly? A. I don't know.

Q. If you had had no pilot on board and had seen the *Narragansett* and her floats in the position in which they were at the time of the first signal what orders would you have given? A. Perhaps I would have done the same thing as Pilot Sullivan did.

Q. You have been giving us from time to time your construction of the rules of navigation, and

403

I want to ask you whether in the situation in which you saw the carfloats at the time you first blew your whistle it wasn't the option under the rules of navigation for the carfloats to pass ahead of your bow, or to turn and pass you port to port? A. There is but one rule; they ought to pass on my port bow; port to port.

Q. Where do you find any such rule as that? A. 24 or 25; I don't know; the International Rule; 19 perhaps.

404

Q. I read your Article 19 and ask you whether this isn't the rule you refer to:

> "When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Is that the rule you mean? A. Exactly.

Q. Do you find any rule that states that that vessel must pass port to port? A. No; but there

405 is another rule; I think 24, that when one steamer is obliged to change her course the other must keep her own.

Q. Where vessels are in the situation covered by Article 19, on crossing courses, isn't it true that the law says that the vessel that sees the other on her own starboard side shall adopt whatever maneuver seems to her safe to avoid the
406 other, and the second vessel shall hold her course and speed; isn't that the substance of the rule? A. Yes.

Q. Applying that rule to the situation as you have testified to it, when you blew your first whistle that means, doesn't it, that the carfloats and the tug towing them were free to pass each side of you; that they must avoid you and that you, on your part, must hold your course without alteration, and also your speed; isn't that the effect of
407 the rule? A. Yes.

Q. Bearing that in mind, don't you want to modify some of the statements you have made here today, based upon the supposition that it was the legal obligation of the carfloats to pass on your port side? A. There is another rule which says that in a channel when it is possible the steamer must take the right of the channel, and we were on the right side of the channel.

Q. You are now referring to Article 25, the narrow channel rule, aren't you? A. I think it is 25.
408 (examines rule.) Yes, sir.

Q. Is it your idea in framing the answers that you have today, that the provisions of Article 25 are superior to and override those of Article 19, where they are in conflict with each other? A. I cannot answer better than that the rules which are Article 27 and 29 are such that you are obliged to make choice sometimes between Article 19 and Article 25; in conformity with Article 27 and Article 29.

Eugene Poncelet. 409

NEW YORK, May 8, 1906.

Met pursuant to adjournment, with the same appearances as before.

Mr. Jones asks that the captain's examination may be continued through an interpreter. Under objection from Mr. Brown, Mr. Jones's request is granted.

The oath of the interpreter is waived. 410

EUGENE PONCELET, cross-examination resumed; with the aid of the interpreter:

By Mr. Brown:

Q. At first, when the pilot blew his signal of one blast, you thought that was an improper thing to do, but afterwards changed your mind; is that right? A. No; at the same time; not since that time; at the same time I changed it.

Q. Didn't you at one time entertain the opinion 411
that the pilot's whistle signal was improper? A. Yes, for a second, but at the same moment I thought that he was right.

Q. At the time when you thought the pilot's signal was improper wasn't your opinion founded upon the provisions of Article 19, which requires the other boat in the position that you saw it, to avoid you by going either ahead or to one side of you, and requires your boat to keep her course? A. No; my opinion was founded upon the con- 412
trary of Article 19; my first opinion.

Q. What do you recall as the contrary of Article 19? A. I think Article 19 says that when two ships are running almost head and head they both must swing to starboard; then my first opinion was that perhaps we could do the contrary of the provisions of Article 19.

Q. When you speak now about Article 19 you mean the head and head rule? A. Article 19 says head to head, or about head to head.

413 Eugene Poncelet.

Q. In order that we may understand each other, I want to tell you for your information that the head and head rule is Article 18, and not Article 19. A. The head and head rule is Article 18? I beg your pardon; the French translation, I beg your pardon, it is Article 18; but Article 18 says, "When steam vessels are approaching each other head and head or nearly so."

414 Q. Isn't your testimony that your second opinion in which you justified the pilot, was based upon the provisions of Article 18, to wit, the head and head rule? A. Yes; exactly.

Q. Was it your opinion at that time that your vessel and the carfloats were in the relative position to which Article 18 applies? A. Yes, sir.

Q. Was your vessel at that time in such a position that if it had been night she would have shown her green light to the carfloats? A. No, I would never have shown my green light to the

415 carfloats.

Q. Don't you know that it is expressly a part of the rule 18 that it only applies to a case where you would have shown both your red and green light, if it had been night, to the other vessel? A. No; because I am sure that in night time I should have never seen the red light of the carfloats; I should have always seen her green light on my port bow.

Q. You haven't answered my question, and I

416 presume you did not understand it. (Question repeated.) Don't you know that it is expressly a part of Rule 18 that it only applies to a case where you would have shown both your red and green light, if it had been night, to the other vessel? A. I don't know whether it applies to that case or to a general case.

Q. You are trained in the rules of navigation, are you not? A. Oh, yes.

Q. You know what their provisions are, don't you? A. Yes.

Q. Don't you know that it is part of the provision of Article 18 that that only applies when either vessel is in a position to see both the side lights of the other? A. Yes.
of the other? A. Yes.

Q. Then you know that they were not in a position to which Article 18 is applied at that time, don't you? A. This was in the day time and I can't be sure; at night I wouldn't have seen the two lights of the other ship.

Q. Are you sure whether or not, if it had been night time, you would have shown both of your own lights to the other ship? A. I am not sure; I think I would have shown him my red light only.

Q. Then according to the opinion expressed in your last answer, Article 18, did not apply? A. In my opinion Article 18 applies; because the two boats were about head on at that time, in my opinion; and consequently Article 18 should apply.

Q. I want you to put yourself on record and tell whether in your opinion this was a case governed by Article 18, or was a case governed by Article 19? A. By both.

Q. Don't you know, as a navigator, that those articles are so framed as to be mutually exclusive, so that they cannot apply at the same time? A. No, sir, they are not exclusive.

Q. When the pilot blew the first blast how far away was the tug and tow? A. I think about one mile.

Q. Did the pilot order the helm to port at that time? A. Yes; port; yes.

Q. At the same time with his whistle? A. About the same time.

Q. Was his order simply "Port" or his order "Hard aport"? A. I think it was hard aport.

Q. That is your best recollection, is it, that it was hard aport? A. My best recollection is it was hard aport.

421 Q. At the same time he made a motion with his arm to indicate that the wheel was to be put hard aport? A. Yes.

Q. Was his order "Hard aport" spoken to you? A. The pilot does not speak especially to anybody on the bridge; he speaks loud, looking forward.

Q. Did anybody transmit that order to the helmsman? A. Yes.

Q. Who did so? A. Sometimes myself.

422 Q. No; that particular order? A. Oh, I don't know; I am quite sure the order was repeated by myself and one of the officers on the bridge, and by the man at the wheel.

Q. Did the man at the wheel obey the order? A. Yes.

Q. You saw that, did you? A. Why, certainly.

Q. Isn't it true that immediately after these things were done you remonstrated with the pilot against what he had done, and got him to do some-

423 thing else? A. I did not remonstrate but, as I have said yesterday, I asked him "Why do you come on starboard; there is plenty of room on our port side"? it was only a question; but I did not interfere with the order given to the helmsman; it was not a remonstrance.

.Q Didn't he answer by saying "Captain, don't get excited"? A. No, sir.

Q. Didn't he make some remark, indicating you should not get excited? A. No, sir.

424 Q. Didn't you state in your report to your officers that the pilot at the time made a gesture to you to signify that you should not get excited? A. Never; I never said that; "get excited."

Mr. Brown: I call for the report.

Q. Have you examined the paper I hold in my hand, which purports to be a guaranteed correct translation made by our present interpreter, Mr. George H. Stetson, of that report of yours? A. I think I have examined it.

425

Q. When you examined it did you find it to be a correct translation? A. I think it was correct.

Q. Do you admit that the paper I hold in my hand is that translation?

Mr. Jones: That can't be admitted.

Mr. Brown: Here is a paper that he says he has verified, and I am asking whether that is the paper.

426

Mr. Jones: Here is a witness that is very willing to testify in English, as far as he can.

Mr. Brown: Bring your original.

Mr. Jones: The original is here, but let us go step by step; the witness is trying to give his answer in English the best he can, but when he comes to questions of fine distinction, he has shown that he is not able to express himself, and we have had to call Mr. Stetson for the purpose of fairness; he

427

is asked the question as to whether or not the translation of a report in French is approved by him as an English translation; of course he cannot testify to that; he is not a translator. Mr. Stetson can say that this is a translation of his report, and he can verify it in any way he pleases, but to ask the captain that question is to ask the captain to be an expert translator from French into English.

428

The Court: I think that is a sound proposition.

Mr. Brown: I will accept Mr. Jones' position.

Mr. Jones: It may be that even the interpreter, experienced as he is, in a running translation will make a misuse of a word; when his attention is called to it he will say I should have used another word;

429 I have seen that occur over and over again, especially in French, where there are forty different words to express forty different shades of the same meaning. It is only fair in a case of this kind, where there are close lines drawn, that we should not be bound down by the translation of the captain, or even by the running translation of the in-
430 terpreter.

THE COURT: We have to be bound by something.

MR. JONES: We will, ultimately, when we come to examine into the facts.

MR. BROWN: I ask that my question and the captain's answer be taken down in French, and in English, both.

MR. JONES: That is very good.

431 Q. Est'ce que vous n'avez pas dit dans votre rapport "Sullivan me repond avec un geste significant de ne pas m'emouvoir? A. Oui"? Is it not true that you stated in your report "Sullivan replied with a gesture signifying that I should not excite myself"? A. Yes; I think——

MR. JONES: The witness was about to say that——

THE WITNESS: I think the word "excited" is too strong as a translation of the
432 French word "m'emouvir."

MR. BROWN: I move to strike out what the witness thinks, as not responsive, and further on the ground that his own counsel has taken the position that the captain is not competent to translate from French into English.

THE COURT: I will let it stand; it may throw some light on the matter.

Mr. Brown excepts.

Q. Since you think you are competent to translate the French word "m'emouvir," I wish you would give me the best English equivalent you know for that expression? A. I don't know the English word.

Q. You don't know any better English word to express the French word "m'emouvir" than the expression to get excited, or to excite one's-self, do you? A. Perhaps emotion. 434

Q. Immediately upon the pilot making a gesture signifying the thing that we have been talking about, without repeating it, he said, "All right captain," ordered the helm steadied and the engines stopped; is that true? A. That is according to my recollection.

Q. Didn't he do that because you asked him to do so? A. I don't know; I didn't give any order.

Q. Wasn't it your opinion at that time that you ought to counteract your order to port your wheel, and that you ought to steady it, and that you ought also to stop your engines? A. I have said several times that I thought at that time of two different maneuvers. 435

Q. Can't you tell me whether it was your opinion that the wheel which had been ported, ought to be immediately steadied? A. I don't know.

Q. Do you mean that you had no opinion on the subject at that time, or that you do not now recall what your opinion was? A. I think that at that time I thought it was not—I think, and I thought at that time, as I think now, that it would not make a great deal of difference to put the helm hard-a-starboard or steady, taking into account the very light speed that we were under. 436

Q. When you just now said, "Hard-a-starboard," you meant what we call in English "Hard-a-port" didn't you? A. Yes; hard-a-port.

Q. At that time you were under the speed that your half speed engine order gives your ship,

437 Eugene Poncelet.

weren't you? A. Yes, the engine-room telegraph was at "demi vitesse," but the ship was not running at all at half speed.

Q. What is the usual half speed? A. In open sea the half speed of my steamer was about nine knots.

Q. And in open sea your full speed was what? A. About seventeen knots; but, as I have said be-
438 fore, on going down the river we had stopped, gone slow, half speed, slow, many times, and then certainly, when the order to the engines was given to go half speed, it took many minutes before the ship was running under her regular half speed.

Q. What is your best judgment that your actual speed in knots per hour was at the time of the whistle? A. Oh, I don't think more than five or six knots.

Q. Have you any opinion as to how many min-
439 utes it will take you to stop the headway of your ship, if you are running at your full speed, that is, your full speed at sea, and reverse your engines full speed astern? A. How much time?

Q. I should like both the time and the distance, if you can give both. A. Two lengths; two or three lengths of the steamer, and five or six minutes; not more.

Q. Do I understand you rightly that if you were making your full speed at sea, seventeen knots, and you reverse your engines full speed astern,
440 you can come to a complete dead stop in the water in two or three lengths? A. Yes, sir; I did it.

Q. You have done it? A. I have done it in taking the pilots many times upon arriving off Sandy Hook Lightship; I have done it and taken note of it, in order to understand how to maneuvre my ship.

Q. The order "Steady" and "Stop" were duly transmitted and executed, were they? A. Immediately.

Q. After that the tug and floats kept their course, which crossed yours, and came to a position directly ahead of you; isn't that so? A. Yes.

Q. At that time you had time enough to turn your course towards the port and avoid the tugs and floats, didn't you? A. No; it was too late.

Q. Didn't you state in your report that at that time, in your opinion, there was still time to come hard to port? A. Of what moment is it a question 442
now? I have lost it.

Q. I think your report has reference to the time when the tug and carfloats reached a position directly ahead of you, and I ask my question in that sense? A. No; when the carfloats were ahead of us it was too late to swing to either side.

Q. Didn't you say in your report:

> "The towboat kept her course, which was a little oblique to ours, which put her right ahead of us; in my opinion there was still 443
> time to come hard to port."

Didn't you say that in your report? A. Yes; but I want——

Q. That is in your report, is it? A. Yes.

Q. Have you changed your opinion since that time? A. No.

Q. To what moment do the words of your report apply when you say there was still time to come to port? A. It was certainly before the 444
second blast.

Q. But the time we are talking about was before the second blast, wasn't it?

> Mr. Jones: This question does not include the whole of that paragraph of the report; it stops at a comma; there is no use in prolonging this case. "The towboat——"
>
> Mr. Brown: It is followed by an argument; I submit that that is a matter for reexamination.

445 Eugene Poncelet.

THE COURT: He can examine it any way he pleases, Mr. Jones, and you can examine the witness on it afterwards.

Mr. Jones excepts.

Q. You have just stated that the time to which your report applies was some time prior to the second whistle, but the time to which my former
446 question had application was also before your second whistle? A. I can't answer that, because I think my report, giving the description of so many things happening at the same moment, should be presented to me again, you know.

Q. I would like to have you examine your report, and after examining it as much as you wish to, just answer my question, and tell me if possible to what moment of time your statement applies, that in your opinion there was still time to
447 come around to port? A. (Witness examines original report) Well, it was for the first blast.

Q. And it was also after you gave the orders "Steady" and "Stop" was it not? A. I didn't give any order.

Q. It was also after the orders "Steady" and "Stop" were given on your ship, was it not? A. All that happened in a few seconds, I can't say if it was immediately before or after, or at the same time.

Q. As I understood you, the orders "Steady"
448 to the wheel, and "Stop" to the engines were given at the same moment of time? A. They were given about the same time.

Q. At what distance from you do you estimate the tug and floats were at that time, when the orders "steady" and "stop" were given? A. In order to answer that question I ask whether it was at the first blast of the whistle?

Q. I wasn't present at the collision; you have testified that these orders were given after the

time when the first blast was sounded, and I am now asking you about how far away, approximately the tug and floats were? A. About a mile.

Q. What was the next maneuver after that on the part of your ship, and I include in my word "maneuver after the giving of the orders "stop" and "steady" to the wheel; what was the next thing done on your ship in the way of blowing signals, giving orders to the wheel, or giving orders to the engine? A. The orders were "port" "steady," one whistle about the same time, and full speed astern; that is all I remember. 450

Q. You haven't answered my question. I ask what was the next thing done on your ship after the orders "stop" and "steady"? A. No maneuver followed.

Q. Wasn't the next thing that happened on your ship the giving by the pilot of a second signal, and the swinging of the ship to starboard again? A. Yes; the orders were given by the pilot "port," and he gave one blast of the whistle. 451

Q. Was that order of his at that time "port" or "hard aport"? A. I think it was "hard aport."

Q. So that the order "hard aport" was given twice while the vessels were approaching? A. I think so.

Q. It was your opinion at that time, was it not, that you ought not to have changed your heading, but ought to have remained with the same heading and waited for the tugboat to take some step on her part? A. We ought to have held about the same heading, about; but it was my duty to come to starboard a little, to facilitate the maneuver that we supposed the carfloats would make, according to the rules. 452

Q. When you say "according to the rules" now, do you mean Article 18? A. 18, 19 and 21.

453 Eugene Poncelet.

Q. You didn't mean any more one rule than the other? A. No; I am obliged to take into consideration Articles 21, 27 and 29, too.

Q. When the pilot blew the whistle signal the second time didn't he also order hard aport to the helm and full speed ahead to the engines? A. I remember only hard aport; I don't remember full speed; I don't think he did.

454 Q. You were listening yesterday, when the pilot testified that he gave the order full speed ahead to the engines? A. Yes.

Q. Didn't that refresh your recollection at all about it? A. No; I did not remember the order full speed ahead; I remember only hard aport, and I think it was hard aport because the speed of our steamer was very small, and with a long steamer heavily laden, as she was at the time, when she had no speed you must put the helm al-

455 ways hard aport or hard astarboard; a single screw steamer.

Q. Do you feel sure in your mind that Pilot Sullivan was mistaken when he testified that he gave the order full speed ahead, or do you think you simply didn't notice it at the time? A. I don't know.

The question is translated to the witness by the interpreter.

456 The Witness: I don't know; I don't believe that he gave the order full speed ahead; but I don't know exactly; I don't believe he did.

Q. You have spoken of your slow speed at the time of the second whistle signal; was it any slower than it was at the first whistle signal? A. Oh, yes; a little less.

Q. What was it at the time of the second whistle signal, if you can give it? A. Three or four knots.

457

Q. You have just testified, two or three questions back that in your opinion at the time of the second whistle signal it was proper navigation on your part to turn a little to starboard; is that right? A. Yes, sir.

Q. You have changed your opinion in that respect since you made this report haven't you? A. I don't think so; I think I have discussed the case in my report; I have explained the two opin- 458
ions that I had why, and why I finally concluded by approving what Pilot Sullivan had done.

Q. In your report didn't you state as follows:

> "We should have remained stopped, and with the same heading, waited for the tugboat to announce her evolution; a second time, to my great surprise, and under the same conditions as the first time, the pilot himself gave a blast of the siren and swung the ship to starboard; I questioned him 459
> quickly and obtained the same reply."

Didn't you make that report? A. Yes.

Q. After refreshing your recollection by examination of your report, are you not now willing to admit that your opinion in this regard has altered since the making of this report? A. No.

Q. When you say in your report: "We should have remained stopped, and with the same heading waited for the towboat to announce her evo- 460
lution," to what point of time, or to what point in the order of events does that have reference? A. It was after the first blast; when I am discussing the question in my report of what has been done and what should have been done.

Q. At the time of the first blast you were running under the order half speed, weren't you? A. Yes, under the half speed; but with very slow speed.

461 Q. Therefore, the expression, "he should have remained stopped," cannot possibly refer to that point of time, can it?

The captain reads the report, up to the point of time suggested by Mr. Brown.

A. After the first blast.

Q. How long after the first blast? A. That was
462 when I said we should have stopped and waited for the movements of the carfloats.

Q. To what point of time in the order of events does that statement refer? A. To the time of the first blast; when I thought of what could happen if we came to starboard, or if we came to port, and what would have happened.

Q. You tell me that your opinion has not altered since the making of this report? A. No, sir.

Q. Therefore, it is now your present opinion
463 that at the time of your first blast you should have stopped your engines and remained with the same heading until the tug adopted her maneuver? A. It was my first opinion——

Q. I am asking about your opinion to-day? A. It is my first opinion to-day; but I have a second one at the same time.

Q. Two opinions to-day? A. Yes, sir; I should discuss the case exactly the same way now that I have discussed it two years ago, exactly; because it is a case of navigation, and if you will read
464 my report entirely, you will see how I may have two opinions, and the Court will know what I mean.

Q. This statement in your report, about you should have remained stopped and with the same heading waited, etc., appears a whole page after the statement which you make about your having ordered "steady" and "stop"; and doesn't it refer to a later point of time than the orders "stop" and "steady"? A. Well, I could not answer

without reading the whole page; because if I read the whole page the whole thing will be clear. On reading only part of it I don't know what I am saying. 465

Q. Well, go ahead and read the whole page. A. You have asked me about what she did after stop, or starboard, when we said hard aport?

Q. No, that wasn't my question at all; the question that I have been trying to put to you for the last several minutes has been to get you to tell me to what point of time, or what point in the order of events, your opinion applies that has been expressed in your report, to wit, that you ought to have stopped, and with the same heading have waited for the towboat to announce her evolution? A. After the first blast, but I want just to read you a page "The pilot Sullivan seized the cord of the siren and gave——" If you take off one or two lines the whole thing will not be clear. 466 467

Mr. Brown: Read it all over to yourself, and then give me the answer.

Mr. Jones: The first answer of the witness was, "I can't answer your question without reference to the whole report." In that condition of things he has got either to read the report or state the substance. I am indifferent as to whether he reads it verbatim, as in the report, or whether he gives it in substance.

The Court: If he wants to read the report, or a part of it as his answer, he may do it. 468

Mr. Brown: My question applies only to that point of time to which those sentences in the report refer.

Mr. Jones: The answer of the witness is, "I cannot answer that question without reading the whole report," and he has either got to read it *verbatim et literatim* or give the substance.

469 Eugene Poncelet.

THE COURT: He can read it, or give it in substance.

THE WITNESS: I don't exactly understand the moment you are speaking of.

The place referred to is shown the witness by the interpreter.

Q. You said that there was some time when, in
470 your opinion, your vessel ought to have remained stopped with the same heading and ought to have waited for the tugboat to do something—now when was that? A. It was immediately after the first blast, and my opinion was—I will read it in full.

Witness reads, as follows:

"In my opinion there was still time to come hard to port——

THE WITNESS: To come hard to port.

(Continues reading.)—"but to do that it
471 would have been necessary to be sure that the towboat, obeying our blast of the whistle tardily, although whether with carefulness, carelessness, or lack of looking out she had not replied to it; would not finally come to starboard, and then if a collision had occurred it would have been entirely chargeable to lack of observances of the requirements of the Article cited above; besides, our respective course and position brought us under Article
472 19 of the Rules, and seeing the *Bretagne* on her starboard side the towboat should have changed her course and gone to starboard. As to us, we should not in any case, especially after the blast of the whistle, go to port; such was my reasoning while regretting the inopportuneness of the sonorous (sound) signal, the danger of which I foresaw. Such must have been the idea of the pilot, who states that he would not be able to avoid the

other convoy of lighters which had us a little on her port hand. We should, therefore, have remained stopped and with the same heading waited for the towboat to announce her evolution; a second time to my great surprise and under the same condition as the first time, the pilot gave, himself, a blast of the siren and threw the ship to starboard."

THE WITNESS: That is all.

Q. Wasn't it your opinion, from the beginning up to the time of the second whistle signal, that you ought to have kept the same heading? A. It is possible that it was my opinion; but according to our slow speed when the helm had been put hard aport our course had changed very little.

Q. When the pilot again blew one blast you were just as much astonished as you were the first time, weren't you? A. Yes.

Q. You hadn't expected anything like that from him? A. I don't know.

Q. Didn't you protest again? A. I only questioned him; but I did not think it was a dangerous move, because if I had thought so I should not have let him do what he did.

Q. Didn't you, as a matter of fact, countermand his order of hard aport and compel the helm to be steadied? A. No, sir, never.

Q. Didn't you request the pilot to retract that order and give the order steady to the wheel? A. No, sir.

Q. How quickly after the pilot's second order of hard aport was the order steady given? A. I don't know.

Q. Give me your best judgment? A. I can't.

Q. Have you no recollection? A. It is to—everything has been done very quickly; so I can't remember how many seconds between the different orders.

477 Q. You say it is a matter of seconds and not a minute? A. I think so.

Q. How far should you think the tug and floats were at the second signal? A. At the second signal about, not quite half a mile, I suppose.

Q. Quite a good deal less than half a mile? A. I don't know exactly.

Q. How far away do you think the tug was when
478 the second order of steady was given? A. I think it was about half a mile too, because the second order of steady was given at the same time as the second blast, I suppose; as much as I may remember.

Q. At this time were the tug and floats still directly ahead of you? A. At the time of the second blast? They were a little bit on our port bow; but not very much.

Q. You have testified that previously they had been directly ahead of you; had they got back
479 again to the port bow after that? A. I have never testified that they were directly ahead; I have always said that they were a little bit on my port bow; I have only said they were directly ahead in the time of collision.

Q. Only a few minutes ago I read you the following sentence: "Towboat kept her course which was a little oblique to ours, which put her right ahead of us," and you admitted that that was in your report, and you admitted that that
480 was true; do you wish to qualify that in any way? A. Yes; I said the convoy made an oblique course, which had put her ahead of us; I mean that it brought her ahead of us but still a little on our port bow; but almost ahead.

Q. In your report your expression was as follows:

"Cequi le replace droit devant nous."

That was your expression in your original report, wasn't it? A. Yes; almost a little bit on the port bow. 481

Q. Doesn't "droit devant nous" mean "exactly ahead of us"? A. Oh, yes, but at some degrees; but it was always on our port bow; never right ahead; exactly right in line with the two masts.

Q. Then your expression wasn't precisely accurate? A. Yes; I know; I remember; not quite exactly; it is too strict you know, but it was always on my port bow, as I said yesterday, and I always say. 482

Q. As soon as the order to steady your wheel was given the second time, didn't you also reverse your engines? A. They were reversed, not very long after the second blast.

The question is translated to the witness by the interpreter.

483

A. All I remember is that after the second blast I don't remember if it was after the word "steady," because the word "Steady" didn't mean anything for me, as I have said before, on account of the small speed of the vessel; I remember only that it was after the second blast, a very small time after the order of stop, that the order of full speed astern was given.

Q. The reversing of your engines took place upon your command or request, did it not, personally? A. I have said to the pilot, "Pilot, we must back full speed astern" and he answered me, "Yes, full speed astern"; and we agreed exactly; I have not given the order; I said to the pilot—I always give the order to the telegraph. 484

Q. It was you first who said anything about reversing the engines, wasn't it? A. Well, I told the pilot about the same time as he was about to tell me.

485 Eugene Poncelet.

Q. Wasn't that in the same conversation with him in which you expressed your surprise at his swinging the boat to starboard and get a similar reply to what you had gotten before? A. A little after.

Q. How far away were the tug and floats when you told the pilot that you ought to reverse your engines? A. 200 yards, I presume; about 200
486 meters.

Q. From the time of your whistle signal to the time you reversed your engines you had cut down the distance from one-half of a mile to a distance of 200 meters; is that right? A. Yes; I suppose so.

Q. 200 meters is only just about the length of your ship, isn't it? A. More than the length of my ship.

Q. The *Bretagne* is 155 meters long, is it? A. 155 meters; yes, sir.

487 Q. Your present ship of course is much longer? A. Yes.

Q. The effect of reversing your engines is to swing your bow to starboard, is it not? A. Yes; a little bit.

Q. In your best judgment how much did your ship swing from the time you ordered your engines reversed to the time the collision occurred? A. Half a point I suppose.

Q. You have previously expressed some doubt
488 as to whether the tug and carfloats turned at all or not; but you stated that you thought they turned a little to the westward; I want to ask you now whether you can place a maximum limit upon the amount that they could have turned; how much at the most could they have turned? A. How do you mean that they could have turned?

Q. Can't you say that from what you saw the *Narragansett* and her floats, from the time you first saw them, up to the time of the collision,

could not have turned more than a limit to be fixed by you; can't you say for instance they didn't turn more than one point, two points, or three points, up to that time; or any other amount? A. From the time we blew the first whistle until the time of the collision the carfloats swung to the westward about five or six points, perhaps more; because when we collided, our course had not been changed more than half a 490
point, and we struck the carfloats almost perpendicularly; and it is easy to calculate the angle or how much, how many points the carfloats had changed to the west.

Q. You didn't at any time use your starboard helm from the time of your first whistle signal? A. Yes; we did after having ordered full speed, when we saw that the collision was about unavoidable, and that our direct course with respect to that of the floats was bringing us rather to her after part, rather than her forward part, we 491
hoped to avoid the collision entirely, and while backing astern full speed we had the helm put starboard, hoping to avoid her entirely.

Q. That is, by passing under her stern? A. When we saw that the collision was unavoidable.

Q. You have just said you hoped to avoid a collision, and you tried to avoid it by passing under her stern at that time? A. When we saw we were about to strike her, about in the middle part—we couldn't tell exactly if it was to the third part 492
from the stem or to the middle part, but it was about the middle part of the carfloat we were heading to; then when we saw the distance was very small, we thought she was backing—we did not know it; but she blew her whistle; so we did; what we call an alarm whistle; but only this time we said, "Hard-a-starboard," and the helm remained hard-a-starboard until we stopped.

Q. Which vessel blew the alarm first? A. The carfloats in my opinion.

493 Q. Was that before you reversed, or after? A. Oh, we were—I think we were full speed astern before; but it is a question of seconds.

Q. Up to the time of your reversing the engines you didn't starboard your wheel at all? A. I think the last order to the man at the wheel was "steady"; then when the man gets the order "steady" he tries to keep the course of the
494 steamer steady; then perhaps he can put the wheel sometimes to port, or sometimes to starboard, because the order he has, "steady," that doesn't mean the wheel amidships; to keep the course.

Q. Did you see the wheel astarboard at all? A. I saw it starboard after we were backing full speed.

Q. Did you see it astarboard before that time? A. No; perhaps it was put so, but certainly not very much.

Q. You did not see it? A. No, sir, I did not
495 see it.

Q. Did you hear a whistle from the second tug and floats or barges that you have drawn in your diagram? A. No, sir; because I think, but I can't say she did not, because my attention was all taken by the *Narragansett* and the carfloats; the other one which I have put on my diagram was so much out of our way that we did not care for it.

Q. Don't you think that one of those whistle signals of yours that came to you as a surprise,
496 may have been blown by the pilot in answer to a whistle signal of that other tug? A. I don't know, sir.

Re-Direct Examination by Mr. Jones:

Q. In navigating around a busy harbor like New York you rely upon the advice of your pilot, do you not? A. Certainly; I am obliged to rely upon his experience of the channel; of the buoys; of the

inland and harbor rules, which are not my rules, because I am not an American citizen, and sometimes the change in the grounds, the currents, then I am obliged to always have consultation with the pilot.

Q. And you are constantly confronted with situations of danger, are you not, which lead to discussion and comparison of views? A. Certainly.

Q. You and the pilot have to hastily decide upon 498
your course of navigation?

Objected to as calling for a conclusion.

The Court: I will take it.

Mr. Brown excepts.

Q. You and your pilot have to hastily decide, when you are confronted with situations of danger, as to what is to be done? A. We talk together; but I decide; and if I don't say anything when the pilot has given an order, it is for my 499
men, my crew, and for my officers, as if I had given the order myself; it is the rule.

Q. You have spoken of the number of men on the bridge; were they all actually on duty, or were they merely subject to call in case of necessity? A. There were only three men that were stationed; one at the wheel, one at the telegraph, and one at the siren; the other men, which numbered about five or six, were ready for getting my orders, if anything happened, and to bring them be- 500
low in the ship; for instance, if the telegraph should be broken or the speaking tube should be broken I have my men all ready; but they were not on lookout.

Mr. Jones: I offer in evidence the captain's full report.

It is marked Claimant's Exhibit E of this date.

Mr. Jones: The report is what the cap-

501 Harry Morris.

tains of all French vessels are required to make to the Merchants Marine Company, and contains an account of any accident or anything whatever worth noting. It is called the report. It is made under the French law, called a *Report de Mer,* and this was shown to and dated March 26, 1904. I offer the original and the translation.

502

As to the absent witness it is agreed that Mr. Brown will stipulate that the testimony of that witness will be in harmony with the testimony of the captain.

Claimant rests.

503

Testimony in Rebuttal.

Harry Morris, being duly sworn and examined as a witness for the libelant in rebuttal:

By Mr. Brown:

Q.You are in the employ of the Baltimore & Ohio Railroad Company? A. Yes, sir.

Q. In what capacity? A. Mechanical draughtsman.

Q. Are you familiar with the dimensions of the
504 vessels of the company? A. Yes, sir, I am.

Q. Are the dimensions of the vessels kept as part of the records of that Company? A. Yes, sir.

Q. How and by whom are the measurements made? A. They are taken by myself and the foreman carpenter.

Q. Have you refreshed your recollection by examination of the records of the vessels involved in this suit? A. Yes sir, I did yesterday afternoon.

505

Q. Please state the length and breadth of the three vessels involved in this collision? A. Tugboat *Narragansett,* total length 95 feet, beam 20.6; carfloat *160N,* length 286 feet 10, extreme beam 36.3; carfloat *67N,* extreme length 205.6, extreme breadth 33 feet 10.

Q. Have these two carfloats parallel sides and square corners? A. Yes, sir, they have.

No cross-examination.

506

EDWARD G. CLARKE, recalled in rebuttal:

By Mr. Brown:

Q. It has been stated in the proofs on the part of the *Bretagne* that there was no person on top of the cars on your starboard float; is that so? A. There was not any one on top.

507

Q. Where was the floatman at that time? A. He was busy on the float, some place on the float; I couldn't see him at that time.

Q. What is the practise of tugboatmen towing carfloats as to the manner in which a lookout is kept?

Objected to.

Q. Where and by whom is the lookout usually kept, according to the practise in New York harbor?

508

THE COURT: Not in New York harbor; according to the practise of the Baltimore & Ohio Railroad.

A. On our route?

Q. Well, as to the Baltimore & Ohio Railroad? A. We never post a lookout as a general thing in clear weather in the day time until we get to the

509 Edward G. Clarke.

Castle William fort bound north; we call it the Fort; unless, of course, a vessel in the vicinity should necessitate a lookout before we get to the fort; and coming down we generally dispense with them the same way.

Q. You are speaking of a separate lookout? A. Yes, sir; we never have them on top of the cars in the day time.

510 Q. How about thick weather? A. We always have them on top in thick weather; and the same at night.

Q. Do you know what is the ordinary practise of seamen and harbormen in that regard aside from the practise in your own company?

Objected to.

Mr. Brown: I ask your Honor to examine Article 29 that especially refers to the ordinary practise of seamen.

511 The Court examines the article referred to.

Mr. Jones: I object on the ground that it does not come within the meaning of the rule.

Mr. Brown: I contend that if by any possibility the want of the lookout was the proximate cause of the accident it is highly material to ascertain whether the ordinary practise of seamen requires such a lookout or not under the express language of this

512 rule.

The Court: I will take it.

Mr. Jones excepts.

A. Unless the water is in a congested condition in the river they never have a lookout on top going up and down the bay, except as I have stated.

Q. During the time of your approach towards the *Bretagne,* on the day of the colision, was there any alteration of your helm on your part?

Objected to as not re-examination.

MR. BROWN: Here is the testimony of the pilot that says we swung first to the eastward and then to the westward. 513

MR. JONES: You examined the witness wholly; it was your duty to exhaust your case on the direct; you can't do it on re-direct examination.

THE COURT: I will take it.

Mr. Jones excepts. 514

A. None whatever.

Q. What was the position of the carfloats relative to your tug during the time in question? A. The large float, 160, was on our starboard side, and 67 on the port side.

Q. I wanted to have you tell me in response to my question how the stern of the carfloats were compared with the stem of your tug? A. They both projected slightly beyond our stern, at least aft of our stern. 515

Q. Were the sterns of the two carfloats even with each other or did one extend further aft than the other? A. The large one extended further aft than the other one.

Q. By about what difference? A. Twenty feet or so; fifteen or twenty feet.

By the Court:

Q. How far was No. 60 astern of the tug? A. He was about—well, about twenty feet or more; I don't know exactly. 516

Q. How much did it project approximately ahead of the tug? A. Some distance; she must have been 150 feet ahead of the tug; ahead of her stem.

Q. I understand that the stern of the other float was practically even with the stern of your tug? A. Yes, sir, one float was; she projected slightly beyond ours, but not so much as—not

517 Edward G. Clarke.

over ten feet any way; I should say she projected ahead of the tug, the small float, about sixty or seventy feet, or something like that.

By Mr. Brown:

Q. It appears that both floats projected similarly forward of the bow of your tug, but only a little aft of the stern; which is to be more relied
518 upon, the projection aft of your stern or the projection beyond your bow? In other words, is your estimate of a short distance more to be relied upon than your estimate of a long distance?

Objected to.
THE COURT: I will take it.
Exception.

A. Naturally it would be.

No CROSS-EXAMINATION.

519

Libellant rests.
Testimony closed.
Counsel sum up.
Briefs to be submitted in two weeks.

520

Louis Roch. 521

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BALTIMORE & OHIO RAILROAD COMPANY

AGAINST

S. S. "LA BRETAGNE," her engines, etc. 522

New York, April 11th, 1906.

Depositions taken by consent at the office of E. K. Jones, Esq., No. 49 Wall Street, New York City, on behalf of the Claimant and Respondent Compagnie Generale Transatlantique, before 523 Adeline Sessions, Notary Public, pursuant to notice, on the 11th day of April, 1906, commencing at 12 M.

APPEARANCES:

Messrs. BUTLER, NOTMAN, & MYNDERSE (Mr. Brown) for the Libelant.

E. K. JONES, Esq. and MR. NOLAN, for the Respondent.

524

It is admitted that the taking of the depositions was adjourned by consent from the 10th to the 11th of April.

LOUIS ROCH, being duly sworn and examined as a witness for the repondent, testifies as follows, through an interpreter:

By Mr. Jones:

Q. What is your full name, your age and your

525 Louis Roch.

occupation? A. Louis Marie Joseph Roch; I am now 36 years old; ship master; I am not navigating now; I am in the administration of the company at St. Lazarre.

Q. What position did you occupy on the 17th of March, 1904? A. Third lieutenant on board *La Bretagne.*

Q. Do you recall the departure of *La Rretagne*
526 on that day from New York for Havre? A. Very well.

Q. What time did the ship leave her dock? A. Ten o'clock.

Q. Her dock is Pier 42 North River, is it? A. Yes.

Q. Did the steamer back out from the dock or go out by the head? A. Backed out.

Q. Where were you stationed? A. On the bridge.

527 Q. After the steamer had backed out and straightened on her course down the river what was the general heading with reference to the channel? A. She was going down the river; I don't recollect whether she was a little to the right or a little to the left of the middle of the river until she got down to the Battery.

Q. What was the state of the weather? A. Very clear.

Q. And do you recollect the direction of the wind, if any was noticeable? A. I don't recollect
528 well but I think there was very little.

Q. After you had reached the Battery what was the course of *La Bretagne* with reference to the channel. A. The right side of the channel.

Q. Do you remember sighting about at the Statute of Liberty some carfloats or lighters in charge of a tug, one or more tugs?

Objected to as leading.

A. Yes, two convoys.

Q. Under steam or sail? A. Towed by a tug.

Q. When you first saw these lighters and the tug how did they bear from *La Bretagne?* A. Both on the port hand.

Q. About how many points? A. The nearest one was about one point, a half a point, a point; a point is eleven degrees; between five and ten degrees.

Q. How was *La Bretagne* heading at that time 530
with reference to the channel? A. *La Bretagne* was on the right hand side of the channel, very near to the buoys.

Q. Had you then passed the Statue of Liberty? A. Yes, but very little.

Q. Where were you at that time? A. I was on the bridge, at the telegraph to the engine-room.

Q. How were these carfloats or lighters and their convoys heading at this time- A. They were —I couldn't tell as to the forward part, the bows 531
of the arrangement, but they were on a course which was crossing ours; this was the first convoy; the convoy that was furthest away was on a course about parallel with ours.

Q. How far distant were these convoys and their carfloats and lighters at the time of which you now speak? A. The nearest one wasn't quite a mile; the other one was further away; I think he was as far away from the first one as we were from the first one.

Q. Did you give any signals and if so what were 532
they? A. No, the pilot saw the carfloats at the same time I did.

Q. Were any signals given by *La Bretagne?* A. Yes, the pilot blew the whistle once.

Q. Did he get any response? A. No, there was no response.

Q. Do you know how the tide was running that morning? A. Yes, it was an ebb tide.

Q Swift or slow? A Pretty strong.

533 Louis Roch.

Q. State whether or not the tide interfered at all with the movements of *La Bretagne?* A. No, because the speed of *La Bretagne* was greater than that of the current.

Q. About what was the speed of *La Bretagne* at that time? A. The engine was at half speed; it is very difficult to estimate the speed the ship might have had with the current the way the cur-
534 rent was running.

Q. Proceeding from this point about which you have just been speaking, go on and state in your own way what you saw and what you heard in the way of signals or otherwise by your own ship or either of the convoys of the lighters or car-floats? A. When we saw this convoy that was crossing our course the pilot gave one blast of the whistle and had the ship swung to starboard, and almost at once after that he had the helm amid-
535 ships; the convoy of the lighters did not reply; on the contrary, he seemed to swing a little to his own port hand.

Q. Which one do you mean? A. The only one that was run into; the only one we had to do with; the captain made the remark to the pilot because the pilot whistled without notifying anybody that he was going to do so; the pilot responded all right captain, and he gave the order to stop the engines, and he then gave another blast of the whistle; the tug did not reply; on the contrary, the convoy
536 swung still further towards her own port side, and during that time the two ships began to come together; when the pilot saw that the tug kept swinging to port and that collision was inevitable, upon the observation of the commandant he had the ship backed at full speed; I was the one that gave the signals at the telegraph, and to do this all you have to do is to put the telegraph handle down backward, and there is an agreement with the engine-room that when this signal is repeated

several times that means full speed, and I repeated that signal several times full speed astern; there is a speaking tube also and a tube for listening, and the reply came back from the engine-room full speed astern; when the collision took place the speed of *La Bretagne* was almost null; we were not injured; I don't know just what you want me to say now; the collision took place and we didn't receive any damage.

Q. How far off were the carfloats and their convoys when the engine was stopped? A. Nearly a mile.

Q. And how far were they away when the order was given to reverse full speed astern? A. Three or four hundred meters.

Q. Please state whether during this time the *Bretagne* made any change in her course or heading? A. The only change in the course was made at the time the first whistle was given and the pilot swung the ship about two degrees to starboard; we couldn't swing it to starboard very much because we had the buoys right close to us.

Q. Was there any other change made in the course of *La Bretagne?* A. No, not after in the ship; always held on to the right of the channel, close by the buoys.

Q. Then I understand this change to have been when the nearest convoy was about a mile away? A. Yes, about.

Q. Did you at any time receive any signals from the convoys on the carfloats and lighters? A. No, not from either of them; there was no signal.

Q. Did you observe how *La Bretagne* and the carfloats came together? A. Yes, the *Bretagne* struck the carfloat almost perpendicularly, that is to say, at about right angles upon the starboard side of the lighter.

Q. Had either of the convoys slackened its speed before the collision? A. I don't think so; they

541 Louis Roch.

maneuvered to swing to port, but I didn't notice they slowed down.

Q. Take these models and let B be the *Bretagne* and arrange the carfloats and their convoys on this sheet of paper to show the relative situations of *La Bretagne* with reference to the carfloats and their convoys at the time the *Bretagne* gave her first signal. A. When we saw her first we didn't
542 notice that the tug was between two lighters; couldn't see the tug at all except just the upper end of her funnel; that is the way we thought she was at first (indicating), whereas after the collision we saw she was between the two.

The witness makes diagram as requested. It is offered in evidence and marked Claimant's Exhibit 1 of April 11th, 1906, relative positions of *Bretagne* and carfloats at the time the *Bretagne* sounded her first
543 blast of the whistle.

Q. Take the same models and place them in the relative positions of the *Bretagne* and carfloats at the time the *Bretagne* gave her last signal before the collision, and state what that signal was? A. It was one blast of the whistle; we then went ahead a little and swung a little to starboard; she continued coming towards us in a diagonal direction; we gave the second blast of the whistle and
544 we continued following close along by the buoys; I stated that we gave a second blast of the whistle; the convoy did not reply, but continued on her course swinging a little to port, and when we got in this position (indicating) we gave the last signal before the collision; that is to say we were backing at full speed.

Q. What was the last signal you gave before the collision? A. We whistled several times; I don't recollect but two signals we gave, the first one I

545

have mentioned, and then the second while the convoy was at quite a distance; at the moment when we backed full speed astern I don't recollect whether the pilot whistled several times or not, because I was at the telegraph.

Q. I will modify my question by asking you to place the vessels in the relative positions at the time you reversed your engines full speed astern. A. Here is the position when we backed full speed.

546

Witness does as requested. The diagram is offered in evidence and marked Claimant's Exhibit 2 of April 11th, 1906, Position of the steamer and carfloats at the time the steamer reversed full speed astern.

Q. Did you notice any change in the speed of the carfloats and their convoys at any time after you sighted them before the collision? A. No, I think they went at the same speed all the time; the reason I think that is that they approached us all the time, whereas if they had stopped, with the ebb tide there was running they wouldn't have done so.

547

Q. Without taking another sheet of paper, place on the other half the models showing the relative positions of the vessels when the collision took place.

Witness does as requested. The diagram is offered in evidence and marked Claimant's Exhibit 3 of April 11th, 1906, Relative position of the vessels when the collision took place.

548

Q. State whether or not at any time before the collision you noticed any lookout stationed on any of the carfloats on their convoys? A. No, I didn't see any; a few seconds before the collision when everybody saw that a collision was imminent we saw some men climb up on top of the cars.

549 Louis Roch.

Q. On which float was that? A. The one that we collided with, the nearest one, and they at once jumped over on to the other one.

Q. State the situation of the tugboat between the carfloat with reference to her height as compared with the height of the carfloats and the cars on top? A. The tug was lower than the railroad cars; you couldn't see her wheelhouse, the tug's
550 wheelhouse; you could see just a little bit of her funnel.

Q. Did you see anything or hear anything that you care to relate, occurring after the collision?

Objected to as calling for hearsay evidence.

A. After the collision we continued backing, because the current pushed us continually against the float, and that by maneuvering, working the
551 engines, we kept our position about there; we didn't notice that there was any accident to any persons; at that time we whistled several times, and there were a great many tugs came all around us; I noticed also that our stem didn't cut in very deeply into the car; it was the shock that made the cars slip on the rails and go overboard; afterwards the commandant asked the pilot whether we should order anchor in order to draw up a report of the occurrence; at the time of the collision we closed the water tight bulkhead; afterwards
552 we found that we weren't leaking any, that we had sustained no damage; the captain told the commandant he could continue his voyage, which we did.

Cross-Examination by Mr. Brown:

Q. Have you drawn the vessels in Claimant's Exhibit 2, the earlier sketch forming a part of that exhibit, as nearly as possible to a scale? A. Yes, but the lighters aren't the same size as the ship.

553 Q. Do you think the lighters, relative to the ship, are shown too large or too small? A. Too large in comparison with the size of the ship.

Q. In fixing upon your sketch the distance in a direct line from the ship to the nearer lighter, have you taken as your scale, the dimensions shown of the lighter or the dimensions shown of the ship? A. On nothing at all; it is rather as regards the direction of the ships I have placed; 554 this is a sketch representing the time that we backed, and I think that I should have shown the distance between the ship and the convoy to have been about the length of our ship.

Q. The distance in a direct line from your ship to the nearer lighter then at the moment when you gave the order to reverse your engines was as nearly as you can estimate it, equal to the distance of your ship? A. Yes; I said from 190 to 200 metres; our ship is 155 metres long.

555 Q. At the time of the collision how many deck officers were there on the *Bretagne* holding positions superior to yours? A. I was the fifth; as a matter of fact the three lieutenants are all supposed to be of the same grade, the only difference being that one may have been on board the ship before the other.

Q. Their positions I understand were commandant, second captain and first and second lieutenant? A. And third.

Q. You were the third? A. Yes, sir. 556

Q. Where were those four stationed after you left your wharf and up to the time of the collision? A. The captain was on the bridge, the commandant; the second captain was on the forecastle forward, the first lieutenant was way aft; the second lieutenant was all over the ship, sometimes he might be forward when it was a question of hawser, looking after that, he was all over; I was on the bridge.

557 Q. What vessels do you recall seeing after passing the Battery up to the time of the collision other than the one you collided with? A. I don't recollect.

Q. Were there any? A. I can't say; we saw some I know going down the river, but after we left the Battery I can't recollect whether we did or not; it was two years ago.

558 Q. What were the crafts you have mentioned several times in your direct examination as appearing beyond the one you collided with? A. Big barges, what they call here in New York, barges, great square lighters.

Q. In charge of any tug? A. Yes, but they were towed tandem.

Q. How many barges were there? A. Two.

Q. Do you know the name of the tug? A. No, we didn't have anything to do with that tow there; we were engaged with the other one.

559 Q. Did that further tow pass you near the time of the collision? A. Yes, she must have very nearly at that moment; I can't say precisely, because we were occupied with this one we were in collision with, but she must have passed very near at that moment.

Q. Did you see on which side of your ship she passed? A. On our port side.

Q. What is the position of the telegraph on your ship? A. On the bridge.

560 Q. How close to the forward rail of the bridge? A. It touches right against it.

Q. Is it nearer the port or the starboard side of the ship? A. Starboard side.

Q. How much nearer the starboard side than the port side? A. The telegraph is about two or three metres from the center line of the ship.

Q. You were using your right hand in sending orders to the engine-room by the telegraph? A. Yes.

Q. You stood on the port side of the telegraph? A. Starboard side—yes, port side.

Q. Did you take the drafts of the *Bretagne* prior to this voyage? A. No.

Q. Was she in her usual trim? A. Yes, she was straight.

Q. What is the normal full speed of the *Bretagne?* A. 16½ knots.

Q. What is her half speed? A. It is variable; there is full speed in port which is not full speed at sea.

Q. What is her normal half speed at sea? A. 11 or 12 knots.

Q. What is her slow speed at sea? A. 5 or 6.

Q. Did the engineers have standing orders to give the ship less speed than the speeds you have named when the vessel was navigating in ports or harbors? A. Yes, that is a general order; when you want to go very fast then you repeat several times the same order; when you repeat the order several times that means give all possible speed.

Q. Did those general orders define to what extent the speeds in port should be less than the nominal speeds at sea? A. No, the captain generally has an understanding with the chief engineer as to that.

Q. Opposite what point of the shore was your ship when the order half speed was given? A. I didn't say she was put at half speed; I said she was put at stop; we were at half speed from the time we left the pier; we stopped after the first blast of the whistle.

Q. What speed do you consider you were making on the day of the collision under the half speed order? A. It is very difficult to say, but at the most 10 knots, on account of the current.

Q. Did you give all the engine room orders that were given? A. Yes.

565 Q. How many such orders were given during the time the *Narragansett* and her tow were in sight? A. Two, the first order to stop, and then afterward full speed astern.

Q. Did you give these orders to the engine room upon your own judgment, or because somebody requested you to give them? A. I was told to give them.

566 Q. Who told you? A. The first order was given to me by the pilot, and the second one was given to me by the pilot and the commandant who both spoke at the same time; the pilot gave it to me in English and the commandant gave it to me in French at the same time.

Q. Did the pilot at any time direct that you should order the engines slowed? A. No; we were under half speed from almost the moment we backed out from the wharf, and the only order that was given was the order to stop.

567 Q. You have testified, as I understood it, on two occasions the pilot blew a whistle signal of one blast; is that right? A. Yes.

Q. What interval of time elapsed between the two? A. Perhaps two or three minutes.

Q. Did you get any order at the time of the second signal of one blast? A. No, the pilot himself pulled the whistle cord.

Q. Did you receive any direction to send any order to the engine room at the time the second

568 signal had been passed? A. No, the engine was stopped at that time.

Q. How many seconds or minutes at that time had the engine been stopped? A. When the second blast of the signal was given?

Q. Yes. A. Perhaps two minutes; it is such a long time ago, it is pretty hard for me to recollect.

Q. How close to you was the pilot standing at the time he gave his first whistle signal? A. Perhaps a metre away from me; right near me.

569

Q. Which happened first, his blowing of that signal or his directing you to stop the engines? A. He gave the blast of the whistle first; he then gave an order to the man at the wheel to go a little to starboard, and afterward he had the engines stopped.

Q. Were those three things done as quickly as practicable one after another? A. Yes.

570

Q. You have testified that when you first saw the *Narragansett* and her carfloats they were a trifle less than a mile away; is that correct? A. Yes; perhaps it is a little less than that; in order to know exactly I ought to have a chart with the distance marked on it.

Q. Can you give us that scale more accurately with the assistance of the chart I now hand you? A. I want to see the distance to a mile.

Witness measures distance off on chart.

571

It was very little less than a mile. About three-quarters of a mile.

Q. Was it at that distance that the first whistle signal was given? A. Yes.

Q. The whistle signal was given immediately upon first sighting the *Narragansett* and her carfloats? A. Yes, when it was seen that she was on a course crossing ours, because generally when we go out we see a quantity of barges and lighters and things, and when we noticed this one in particular crossing our course we gave the signal.

572

Q. You never did see the tug and carfloats until they were in the position described did you? A. No.

Q. Who first called attention to the *Narragansett* and tow? A. I don't recollect.

Q. Did you hear some one say something about it before you looked up and saw it? A. I don't recollect.

Q. The first moment you saw the *Narragansett* and the carfloats, she would be as nearly as you can estimate half a point on your port bow; is that right? A. Yes.

Q. How close to Liberty Island did the collision occur in your judgment? A. I wasn't looking at the Statue at that moment.

Q. Was there any object in sight which will en-
574 able you to fix the position where the collision occurred? A. The ships anchored on our starboard side.

Q. Do you remember the names of any of them? A. No.

Q. About the time of the collision or very shortly after, did you look astern and see the Statue of Liberty? A. No, I was occupied attending to the telegraph, we made several maneuvers in order to keep in the same spot; outside of the maneuver-
575 ing and the telegraph, if there was anything that occupied my attention it was the lighter that we collided with, the float.

Q. At the time of the collision for what object on the shore was your ship heading? A. We were heading about for Clifton, Staten Island.

Q. Had you been heading for Clifton, Staten Island, ever since the second whistle signal of one blast? A. Yes, after the first blast of the whistle we came a little to starboard; then the helm was put amidships, and from that time on we didn't
576 change our course at all.

Q. Had the helm been put amidships before the second whistle signal? A. Yes.

Q. At the second whistle signal how far do you think the tug and carfloats were from you? A. Well, they had cut the distance that they were at first down about one-half; I should say less than half a mile; they were less than half a mile from us.

Q. How did they bear from you then? A. Still on our port hand.

Q. Can you give the angle in degrees or points or fraction of a point? A. Very little, perhaps three or four degrees, because while we swung a little to starboard the lighter and tug had still continued on their course crossing ours. 577

Q. In Claimant's Exhibit 1, have you attempted to show the amount by which your ship would have been seen on the starboard bow of the *Narragansett* and her carfloats? A. Yes, about; I think that is about it. 578

Q. As I estimate it from your diagram it would be about 2½ or three points; is that what you think it is? A. Yes.

Q. From that time on the angle at which the navigators of the *Narragansett* must have seen you on their starboard bow must have been constantly increasing; isn't that? A. Yes, but at that time we swung to starboard a little, but not very much, and then the helm was put amidships and we went straight along on our original course; there were the buoys on that side and we couldn't swing any more. 579

Q. That doesn't at all qualify your former answer that you were constantly broadening on the starboard bow of the *Narragansett,* does it? A. I don't understand your question very well.

Q. (Repeated.) That doesn't at all qualify your former answer that you were constantly broadening on the starboard bow of the *Narragansett,* does it? A. Yes, I understand now; I think the angle did increase particularly as he himself swung to port himself; by saying he I mean tug and lighters. 580

Q. Did you hear any whistle signal whatever from the *Narragansett?* A. No, and after we had blown our second blast of the whistle we looked at him attentively to see whether there was any steam arising from him, indicating he had whistled, because sometime when a whistle is

blown by another vessel we don't hear the sound of the whistle, but we can see the steam escape and know they whistled.

Q. Your answer as I understand is, that there was no whistle signal whatever from the *Narragansett?* A. Certainly, she didn't give any.

Q. Did you have any regular lookout posted forward on your ship? A. Do you mean on the
582 bridge, or down on the forecastle?

Q. When I say forward I mean entirely forward as close to the stem as possible? A. Yes, the second captain and several men were there.

Q. So far as you know had any one been instructed to act as lookout? A. No, no one.

Q. Was there any report from forward? A. Because the men when they are on lookout are put on the bridge where they can see everything that goes on much better, and a lookout is not put way forward by the stem except when the weather is
583 thick, and you can't see from the bridge.

Q. On this occasion was there any report from the forecastle head? A. No.

Q. You stated in your direct examination that the captain asked the pilot some question concerning his giving the first signal; state what was said as nearly as you can remember? A. He said to him in English "Why did you whistle?" I don't recollect exactly whether he said "Why did you whistle?" or whether he asked him "Why did you
584 go to starboard?"

Q. Do you recall what the pilot's answer was? A. He answered "All right, captain."

Q. What do you understand as a reversing whistle? A. Do you mean the telegraph?

Q. I mean a whistle signal? A. There was no signal; no signal was given.

Q. I understand you now to state there was no reversing whistle given on your ship immediately prior to the collision? A. I said I didn't recol-

lect whether one had been given; if such a signal had been given it would have been several blasts of the whistle repeated. 585

Q. When you say several, how many do you mean? A. At least three.

Q. Do you understand a reversing signal to include a whistle of four or five blasts? A. The regular number is three, but sometimes they give more than that. 586

Q. Don't you know that there is a difference between a signal of three blasts and a signal of four or more short blasts? A. No.

Q. When you estimated the speed of your ship at ten knots an hour when she was running under the order half speed, did this make allowance for the tide or not? A. You speak now of half speed at sea or half speed in port?

Q. I am quoting your testimony in which you stated on the day of the collision and in the place where the collision happened you were running ten knots an hour? A. I say now that ten knots was with the force of the current aiding. 587

Q. That force you estimated to be one knot per hour? A. One to two.

Q. In still water how far will the *Bretagne* run with her engines stopped before she comes to a complete standstill, if at the beginning of the interval she is making eight and a half or nine knots per hour? A. That is difficult to say.

Q. Give us your best judgment on the subject? 588
A. Perhaps half a mile before stopping completely she would have still a little speed; very little speed, but some.

Q. As I understand you, she might come to a complete stop within half a mile, but for a considerable part of the time near the end she would be going very slowly indeed; is that what you intend to say? A. Yes, and to go that distance of that half mile she would require quite a little time.

589 Louis Roch.

Q. How long a time do you think she would require? A. Perhaps five minutes; it is a long time with regard to the distance she traverses.

Q. If your ship making in still water eight and a half or nine knots per hour has her engines reversed at full speed how far will she forge forward before she come to a complete stop?

590 Mr. Jones: This line of questioning is objected to on the ground that the witness is not shown to have made any experiments of this character.

A. About the length of the ship, 150 metres.

Adjourned to 2:30 P. M.

Met pursuant to adjournment at 2:30 P. M.

591 Cross-Examination by Mr. Roch continued:

By Mr. Brown:

Q. You spoke of having seen beyond the *Narragansett* a tug towing two barges tandem; please state whether the port sides or starboard sides of that tug and those two barges were presented to your view? A. The port sides of them.

Q. Were there any inferior deck officers on the *Bretagne* to yourself? A. No.

592

Yves Morise. 593

Yves Morise, being duly sworn and examined as a witness for the respondent, testifies as follows:

By Mr. Nolan:

Q. Will you state your name, age and occupation? A. Yves Morise; 28 years old; I am chief quartermaster on board the *Bretagne;* I was at that time, and I have been brought here from that ship. 594

Q. You refer to March 17th, 1904? A. Yes.

Q. Are you about to go on a voyage to sea? A. Yes.

Q. Do you remember the voyage of *La Bretagne* from New York on the 17th of March, 1904? A. Yes.

Q. Will you state about what time you left your dock in New York on that day? A. Ten o'clock.

Q. Where were you stationed on *La Bretagne* at that time? A. I was on the bridge. 595

Q. What were your duties? A. I was at the wheel.

Q. Do you recollect the collision which occurred between *La Bretagne* and some floats and a tug of the Baltimore & Ohio Railroad? A. Yes, very well.

Q. Where were you at the time that *La Bretagne* collided with the tug and floats? A. I was at the wheel.

Q. Do you know of anything occurring before the collision with this tug and these floats; if so state what it was? A. No. 596

Q. Do you know which side of the channel *La Bretagne* was on previous to the collision? A. About in the middle of the channel.

Q. When did you see this tug and these car-floats? A. I didn't see the tug because there was only a little bit of her funnel showed; I saw the floats and this was about half-past ten.

597 Yves Morise.

Q. Where was *La Bretagne* when you first saw these floats? A. Just before we got down to the Statue of Liberty.

Q. About how far away was this tug and these floats when you first saw them? A. About a mile away from us.

Q. In what direction from *La Bretagne* were they when you first saw them? A. About a half
598 a point on our port hand ahead.

Q. Which side of this tug and these floats did you see its port side or starboard side? A. I saw the starboard side of the lighter, the float.

Q. Do you recollect any signals being given by *La Bretagne?* A. Yes, I remember very well that she gave a blast of the whistle.

Q. When was this? A. When we were about a mile away from the floats; the tug didn't reply.

Q. Will you state just what occurred after this signal was given by *La Bretagne* up to the time of
599 the collision; state it in your own way? A. The pilot gave a second blast of the whistle and at once had the engine stopped; he had the engine stopped and gave the order to have the helm put a little to starboard and the ship swung to starboard very slowly; she came to the starboard perhaps a point and when the pilots saw that the floats and the tug still kept coming on to us he had the engine backed at full speed and had the helm put amidships; the lighters kept coming on
600 towards us and the engine was backing all the time; finally they came on and came close to us, and we touched them, and we weren't injured at all; we just shaved them, gave them a little light blow; we struck them diagonally, and cut them just a little; I saw then that the float listed over and that the cars got off from their tracks and went into the water.

Q. Did those cars slide off the tracks into the water or were they overturned into the water,

and which way did they fall, in the direction of the tug? A. I can't tell you.

Q. When you used the expression a few minutes ago that the helm was put to starboard, you mean the course of the ship was changed to starboard? A. Yes, the ship swung a little to starboard.

Q. Did you after the first signal was given to *La Bretagne* listen carefully to see if any answering signal was given by the tug? A. Yes, we saw very well there was neither smoke nor steam coming out of her whistle.

Q. And you heard no answering signal from the tug to your second signal either? A. No, not at all.

Q. Do you know how the tide was on that day at that time? A. No.

Q. Is there anything else respecting this collision which you know and which you can now state? A. No, I can't say anything more than what I have said.

CROSS-EXAMINATION by Mr. Brown:

Q. How long have you served in the employ of the Compagnie Generale Transatlantique? A. Seven years.

Q. All of that time on *La Bretagne?* A. No, I have been on board of her about five years.

Q. What is the position of the wheel you steer by ? A. Up in the wheelhouse on the bridge.

Q. You were standing directly behind it at the time of the collision? A. Yes, I was.

Q. Were the windows of the wheel house open or closed? A. They were wide open.

Q. From where you stood could you see the telegraph to the engine-room? A. Yes, perfectly.

Q. Did you stand at the wheel from the time of leaving the pier? A. Yes.

Q. What orders stood on the telegraph coming down the North River? A. Half speed.

605 Q. What attracted your attention to the tug and carfloats with which you afterward collided? A. I saw because I was steering right for her.

Q. You were heading as nearly as possible for her when you first saw her? A. Yes, nearly, but she was a little on our port hand.

Q. You didn't hear anything said by anybody in the pilothouse or on the bridge to call your at-
606 tention to her? A. No.

Q. How long after you first saw the tug and floats was there a whistle sounded on your steamer? A. About theree minutes.

Q. At the time when your whistle was sounded how far above the Statue of Liberty do you think your steamer was? A. I think we were about a mile above the Statue.

Q. Do you think the tug and carfloat were almost exactly opposite the Statue at that time? A.
607 They were getting very near the Statue.

Q. At the time when the collision happened had the tug and carfloats passed to the upper side of a position abreast the Statue of Liberty? A. I can't say.

Q. You have testified that when you first saw the tug and floats you thought they were a mile distant; I want you to state how far distant they were when the pilot blew his first signal whistle? A. About a mile.

Q. How long after the first whistle signal did
608 you hear the second whistle signal? A. About three minutes.

Q. How far away were the tug and floats at that time? A. 200 meters.

Q. Is that about the length of your ship? A. It is longer than the length of our ship.

Q. What is the length of your ship? A. 155 metres.

Q. Then it would be about a length and a third of your ship? A. Yes.

609

Q. How much time later were the engines reversed after the second whistle signal? A. The engine was stopped right away as soon as the second whistle was blown and about a minute after they were backed at full speed.

Q. When the engines were reversed how far away were the tug and floats? A. I don't know.

Q. How long a time after the second whistle signal were the engines stopped? A. A minute after.

610

Q. Were the engines stopped as a part of the same order by which they were also reversed? A. Yes, it was; well, as soon as the engine was stopped the engine was backed.

Q. Just before the order to stop the engine was given what order stood on the telegraph? A. The telegraph was at half speed.

Q. Do I understand you to testify now that for one minute after the pilot blew his second whistle signal the telegraph remained at the order half speed, and that then it was stopped and reversed? A. Yes.

611

Q. At the time your ship was a length and a third from the tug and floats the pilot was giving his second signal whistle, and your vessel was proceeding under the order half speed; isn't that so? A. Yes.

Q. When was it with reference to the whistle signals that you got your order to put the helm to starboard? A. Right away after the second blast of the whistle.

612

Q. When you get an order to starboard that means that you move the upper spokes of the wheel to the starboard side of the ship, doesn't it? A. Yes.

Q. The effect of that order is to swing the bow of the ship towards the starboard? A. Yes.

Q. At the time when you heard the first whistle signal you were holding your wheel amidships? A. Yes.

613 Q. Did you then keep your wheel amidships until just after the second whistle signal, when you say you got the order to starboard? A. Yes, sir, I kept it amidships until the pilot gave me the order to starboard.

Q. When you got the order to starboard did you put the wheel hard astarboard? A. No, a little, I just gave her a little wheel.

614 Q. How many spokes do you think you turned the wheel? A. Ten degrees of the tiller.

Q. Does the *Bretagne* steer by steam or by hand? A. By steam.

Q. When your wheel stands amidships how much of a turn do you give to put the helm hard over? A. Two turns of the wheel or two turns and a half.

Q. From the time you first saw the tug and carfloat did you at any time see the telegraph stand at full speed? A. No, I didn't see it.

615 Q. Did you hear the pilot give the order for full speed ahead? A. I heard full speed astern.

Q. My question was whether at any time after you first saw the tug and the carfloats the pilot gave an order for full speed ahead? A. No, I didn't hear any such order.

Q. Did you see the telegraph within that interval at any time standing at slow? A. Yes.

Q. When was that? A. It was at half speed then; no, I didn't see it at slow, at the word *lente-*

616 *ment.*

Q. When the order is given on the telegraph is there a bell on the bridge that rings? A. Yes, there is one under the telegraph on the bridge.

Q. Did you hear that bell ring about a minute after the pilot gave the second whistle signal? A. Yes.

Q. Did you then look up and see that the order stop had been put on the telegraph? A. No, I didn't but I heard repeated the word stop by the men.

Q. By whose voice did you hear the order stop repeated? A. Guillou's; he repeats by the speaking tube to the engine-room. 617

Q. What is Guillou's position? A. He is a quartermaster.

Q. Why couldn't you see the telegraph at that time? A. Because I didn't pay attention; I was attending to steering.

Q. A minute before that when the pilot gave his second whistle signal were you looking then at the telegraph? A. No. 618

Q. Did you see the order that stood on the telegraph during that minute after the pilot blew his second whistle signal and up to the time when you heard the order stop? A. No, I didn't.

Q. Before the time when the telegraph bell rang and you heard the order stop repeated had the telegraph bell rung at all? A. Yes.

Q. Do you know what order was given then? A. No. 619

Q. How long before had it been? A. About a minute; not altogether a minute.

Q. Do you know what order was given at that time? A. I do not.

Q. You have spoken of seeing the order half speed on the telegraph; I want to ask you when was the last time you remember to have seen that order standing on the telegraph? A. When the second blast of the whistle was given. 620

Q. At the time the second blast of the whistle was given by the pilot you did look at the telegraph and see this order at that time? A. Yes.

Q. You didn't intend to testify previously that at the time of the second whistle signal you weren't looking at the telegraph? A. I meant there that I wasn't looking at it, but when I heard this second blast of the whistle and heard the bell ring I looked and saw it was half speed.

621 Q. Then you meant to testify that you hadn't been looking before but when the whistle signal was given you then did look? A. Yes.

Q. Please take these models and indicate as well as you can the position of the vessels at the time the collision happened? A. They were that way at the moment of the shock.

Witness makes diagram as requested. It
622 is offered in evidence and marked Libelant's Exhibit A of April 11th, 1906.

By Mr. Nolan:

Q. Will you state what was the position of the tug between these two carfloats, as to how much of it you could see? A. We could hardly see her funnel; a little bit of the end of it; we could hardly tell what it was.

Q. Where was the bow of the tug with reference to the carfloat? A. I didn't see it; it was con-
623 cealed by the cars.

By Mr. Brown:

Q. I understood you to testify when you got the order to move your wheel to starboard the ship's head swung about one point; is that right? A. Yes.

Q. Just after you had made that turn how did the tug and carfloats bear from you? A. They were still on the port side of us, but almost ahead of us.

624 Q. Were they as much as half a point on your port bow at that time? A. About half a point.

Q. Are you quite sure it wasn't as much as a point? A. Oh, no doubt; half a point.

Q. You think half a point was the most? A. Yes.

Re-Direct Examination by Mr. Nolan:

Q. How was the helm placed when you first saw this tug and these floats? A. Amidships.

Q. And it was amidships when the pilot gave the first signal blast, the first whistle? A. Yes.

Q. When did you next change it after that? A. It remained amidships until the pilot told me to put it to starboard, when he gave the second blast of the whistle.

Q. Do you remember signing a deposition concerning the facts of this collision on board *La Bretagne* the day after this collision occurred?

Mr. Brown: I object, as laying a foundation to impeach your own witness.

A. Yes.

Q. If you were to read that deposition now, would it refresh your recollection as to the facts of that collision?

Mr. Brown: Same objection. The question is also objected to upon the ground that it is improper to refresh the witness's recollection unless he has testified that he cannot remember without assistance.

A. It would in view of the fact that this happened two years ago.

Q. Your mind at present is somewhat indistinct as to the actual facts of this collision, isn't it?

Objected to as leading.

A. I recollect very well what I have testified to just now.

Q. If on reading this deposition you found that the facts as stated in the deposition are contrary to the facts you have testified to to-day, which would you say is truest, the deposition signed then, or the facts you have stated to-day?

Objected to as incompetent and immaterial and as an attempt to impeach one's own witness.

629 Yves Morise.

A. They ought to be the same thing, although it was two years ago.

Q. (Handing witness paper.) Will you examine this signature on this paper and tell me if that is your signature at the end of it? A. Yes, that is my signature.

Q. Do you recollect signing that paper? A. Yes.

Q. Do you know what paper it is? A. Yes.

630 Q. What is it? A. It is the report.

Q. Will you take and read that paper and state if after reading it it refreshes your recollection as to the facts of this collision?

Mr. Brown: I object to the paper sought to be shown the witness and I object to his refreshing his recollection, first upon the ground that he has testified he remembers distinctly the facts to which he has testified to-day, and second upon the ground that
631 the paper sought to be shown the witness is apparently not in the witness's handwriting and has not been verified by the witness as correct.

The paper is shown to the witness and read by him.

Q. Have you read that paper? A. Yes.

Q. Will you now state if that has refreshed your recollection as to the facts of this collision?

632 Same objection as before and also as leading.

A. My memory has been refreshed by reading this.

Q. Do you recollect now when it was you first received the order to port your helm?

Objected to.

A. Yes.

Q. Will you state when that was?

Objected to.

633

A. It was when the second blast of the whistle was given.

The paper just identified by the witness is offered in evidence.

Mr. Brown: It is objected to on the ground that it is secondary evidence and on the ground that it has no other purpose apparently than to impeach the witness, and upon the ground that the paper is not a memorandum made by the witness and not identified by him as correct.

634

Mr. Nolan: The paper is shown the witness not for the purpose of impeaching him, but for the purpose of refreshing his memory.

The paper is marked in evidence subject to Mr. Brown's objection, Claimant's Exhibit 4.

635

Re-Cross Examination by Mr. Brown:

Q. Can you recognize the handwriting in which the paper that has just been offered in evidence was written? A. I think it is the writing of Mr. Guimont.

Q. He is second lieutenant? A. Yes, second lieutenant.

Q. Do you remember that when your ship was coming out of the North River the course was more towards the Brooklyn shore that is the easterly side of the harbor than it was afterward? A. Well, we go down generally in the middle of the channel.

636

Q. Did you come down in the middle of the North River that day? A. Yes.

Q. The course that you steered in the North River if you didn't alter it afterward would carry you over towards the Brooklyn shore of the Bay, wouldn't it? A. Yes, but we frequently change our course.

637 Yves Morise.

Q. When you come down the North River, or shortly afterward, you were compelled to alter your course to starboard in order to follow the usual course down towards the Narrows, are you not? A. Yes.

Q. Did you make that usual and regular change of course before you saw the tug *Narragansett* and her carfloats at all? A. Yes, we changed our
638 course before arriving down at the Statue; there are buoys there to show us.

Q. When you made that regular change of course to starboard had you seen the tug and carfloats yet? A. No.

Q. How soon after that change of course did you see the tug and carfloats? A. About ten minutes.

Q. Do you remember that about half way between the mouth of the North River and the Statue of Liberty there is an island on your star-
639 board hand coming out called Ellis Island? A. I know there is an island there, but I don't know the name.

Q. Whereabout with reference to that island do you think your ship was when you got this order for a change of course before seeing the tug and carfloats? A. I couldn't see from where I was at the wheel; I couldn't tell what its bearing would have been.

Q. You weren't looking at objects on the star-
640 board side at that time? A. No, I was looking ahead.

Q. Could you see objects on your port side at that time? A. No.

Q. Don't you remember that a little beyond the Battery there is a large island called Governors Island, and at the westerly end of it there is a stone fort or castle? A. Yes, I do.

Q. Did you notice when you passed it the day of the collision? A. No.

641

Q. How long do you think it took you from the mouth of the North River until you got abreast of the Statue of Liberty? A. Five or six minutes.

Q. How many minutes after coming out of the mouth of the North River was it that you got your order for the regular change of course to starboard before seeing the tug and carfloats at all? A. We changed our course so often I don't recollect.

642

By Mr. Nolan:

Q. Do you know what Mr. Brown refers to as the mouth of the river? A. It is the place opposite Brooklyn before we get down to the Statue.

Q. On your direct examination you testified you received the order to port your helm after the first blast of the whistle given by the pilot; on your cross-examination you testified you received that order after the second blast of the whistle by the pilot; now I read to you an extract from the paper which you identified a few minutes ago; please state which is correct?

643

Mr. Brown: The question is objected to upon the ground that the witness has already answered a similar question on three or four occasions, and he has persisted in his statement that he got the order after the second signal whistle, notwithstanding that at the time he made that answer he had already read the paper referred to, and under the circumstances the further question cannot be considered otherwise than as peremptory instruction from counsel to witness to change the answer he made.

644

Mr. Nolan: The question is directed to the witness in order to clear the doubt which is in his mind, and the confusion raised by counsel on cross-examination, and for no other purpose.

645 Yves Morise.

The extract is read to the witness by the interpreter.

A. This is the truth here; the helm was hard aport at the time of the collision; that is the truth.

Q. You don't seem to understand my question, so I will repeat it.

Q. (Repeated) On your direct examination you
646 testified you received the order to port your helm after the first blast of the whistle given by the pilot; on your cross-examination you testified you received that order after the second blast of the whistle by the pilot; now I read you an extract from the paper which you identified a few minutes ago; please state which is correct? A. They give me so many orders and changes so often——

Q. Which is the truth? A. This document here is the truth, referring to claimant's exhibit 4.

647 By Mr. Brown:

Q. Did you know what stood in this paper before it was read to you just a moment ago? A. I never saw this document; I saw it and it was read to me and I signed it.

Q. Where were you when you wrote your name on this document? A. In Mr. Guimont's room.

Q. The captain signed the document also, didn't he? A. Yes, that is his signature.

Q. How many of you were in the room together
648 when this was signed? A. Mr. Guimont and myself were there only.

Q. Did anybody ever ask you what ought to be put in this paper before it was read to you? A. Mr. Guimont questioned me before writing this document; he wrote as fast as he questioned me.

Q. Did you tell Mr. Guimont at the time you heard the second blast of the whistle the order on the telegraph was half speed? A. Yes, I told that to Mr. Guimont.

Q. Did you also tell Mr. Guimont that immediately after the second blast of the whistle you got the order to put your wheel to starboard? A. I told Mr. Guimont it was after one or two blasts of the whistle I had received an order to starboard. 649

Q. Didn't you tell Mr. Guimont it was after the second whistle signal you got the order to starboard your wheel? A. I received so many orders I couldn't have told him whether it was the first or second. 650

Q. Do you know whether it was after the first or second whistle signal you got the pilot's order to put your wheel to starboard? A. It must have been after the first.

Q. Do you say that now because you think the lawyer for the company wants you to testify that way? A. Yes. 651

JOSEPH LE GUILLOU, being duly sworn and examined as a witness for the claimant testifies as follows, through an interpreter:

By Mr. Nolan:

Q. What is your age and occupation? A. I am 27 years old; I am a seaman.

Q. Will you state what was your occupation on the 17th of March 1904? A. I was quartermaster on board the *Bretagne*. 652

Q. Where were you stationed on *La Bretagne* on March 17th, 1904, after leaving? A. I was at the speaking tube to the engine-room.

Q. Do you remember about what time you left the dock in New York? A. About 10 o'clock.

Q. Do you recollect the collision which occurred between the steamer *La Bretagne* and the tug *Narragansett* and two floats of the Baltimore & Ohio Railroad that morning? A. Yes.

653 Joseph Le Guillou.

Q. About where did that collision occur? A. A little before getting down to the Statue of Liberty.

Q. Do you know on what side of the channel *La Bretagne* was proceeding at that time? A. The starboard side of the channel.

Q. Do you know at what speed *La Bretagne* was proceeding? A. Half speed ahead.

654 Q. When was your attention first called to this tug and these floats of the Baltimore & Ohio Railroad Company? A. It was when our siren was blown.

Q. Will you go on and state everything that occurred, to the best of your recollection after the siren was blown on board *La Bretagne* until she collided with this tug and these floats? A. After the first blast of the siren the pilot had the helm starboarded; he had the engines stopped; he then gave a second blast of the siren when he saw that

655 the tug did not answer and he went ahead again at half speed; I think he started the engine going ahead again and then stopped it and then when he saw that the collision was inevitable he had the ship backed at full speed.

Q. About how far away was this tug and these floats from you when you first saw them? A. They might have been about a mile.

Q. How did they bear towards *La Bretagne?* A. We saw them on our port side about a point.

656 Q. Did you notice whether the tug and floats changed their course at any time from the first time you saw them? A. I think they came to their starboard a little.

Q. Did you hear any answering signal from the tug and floats to the signal given by *La Bretagne?* A. Nothing.

Q. Did you hear any answer from the tugs to the second signal given by *La Bretagne?* A. No, I didn't hear any.

657 Q. Can you show us here the position in which *La Bretagne* and this tug and floats bore towards each other when you first saw them? A. That is about it.

Witness makes diagram as requested. It is offered in evidence and marked Claimant's Exhibit 5 of April 11th, 1906.

658 Q. Could you show us the position of *La Bretagne* and this tug and these floats immediately previous to the collision?

Witness does as requested.

The diagram is offered in evidence and marked Claimant's Exhibit 6 of April 11th, 1906.

659 Q. Did you at any time from the first time you saw this tug and floats of the Baltimore & Ohio Railroad Company up to the time of the collision notice any lookouts on the tug or on the floats? A. No; I saw some people on board though, after the collision, but nobody before.

Q. What was the tide that morning at the time of the collision? A. I can't tell you just what state of the tide it was, but I know it was an ebb tide that pushed us along.

Cross-Examination by Mr. Brown:

660 Q. How far above the Statue of Liberty did the collision occur? A. Two miles and a half or three miles; I can't tell exactly; I didn't notice just what distance it was.

Q. Do you mean you would have had to go something like a couple of miles further in order to be abreast of the Statue of Liberty at the time of the collision? A. Yes, about.

Q. Do you often steer in coming out of New York harbor? A. No.

661 Joseph Le Guillou.

Q. Did you notice whether your steamer made any change of course after coming out of the mouth of the North River and before you saw anything of the tug and carfloats? A. After we left the dock we changed our course several times.

Q. I am speaking of after coming out of the North River? A. I don't recollect; we maneuvered so frequently I can't tell.

662 Q. What were your duties from the time of leaving the dock until the collision? A. I was at the speaking tube of the engine-room.

Q. What were your duties at the speaking tube? A. I listened to the orders that were transmitted to the engine-room by the telegraph and I repeated to the telegraph the answers that came up through the speaking tube from the engine-room.

Q. The third lieutenant was handling the telegraph wasn't he? A. The third.

663 Q. Whenever you saw him give an order on the telegraph it was your duty to communicate that same order by word of mouth through the speaking tube to the engine-room; is that not right? A. No, I received the reply that came up from the engine-room ; I didn't give the order.

Q. When the order is given by the third lieutenant on the bridge the engineers receive it in the engine-room, and then some person in the engine-room repeats it by word of mouth through the speaking tube, and it is your duty to listen at

664 your end of the speaking tube and repeat it to the officers on the bridge; isn't that right? A. Yes.

Q. On the day of the collision did you do this at each time any order to the engine-room was given? A. Yes.

Q. When you repeat that order do you speak in a good loud tone of voice so the captain and the different lieutenants and the pilot can all hear on the bridge? A. No, I address myself of what comes up there to the officer who is at the telegraph; he stands right alongside of me.

665 Q. Which way do you face when you are at the speaking tube? A. I look to starboard and lean over a little listening.

Q. Under what order was your ship running from the time you left the dock until you first caught sight of the *Narragansett* and her carfloats? A. Half speed.

Q. Do you remember whether or not you were under the order full speed for part of that time? 666 A. No, we were not.

Q. How long after you had seen the tug and floats was any order to the engine-room given? A. I don't recollect.

Q. Could you say it was a matter of a few seconds or a matter of a few minutes? A. About a minute after seeing the tug; the pilot gave a blast on the whistle; almost at once an order was given to the engine-room.

Q. Was it the pilot's whistle that first attracted 667 your attention to the tug and carfloats? A. Yes.

Q. Wasn't it about a minute after that time that the order to stop the engines was given? A. Yes.

Q. Then the order to stop came about one minute after the first whistle signal? A. Yes.

Q. Do you know whether the order to starboard the helm was given before or after the order to stop the engines? A. I don't recollect whether it was before or after.

668 Q. The pilot blew a second signal blast did he not? A. Yes.

Q. How much after the first whistle signal did he do it? A. About three minutes after.

Q. When he gave that second whistle were the engines working, or at rest? A. I am not sure, but I think it was in motion.

Q. Then the pilot before that time had given another order for half speed ahead? A. Yes.

Q. How long after the pilot ordered the engines

669 Joseph Le Guillou.

stopped did he order the engines to be put forward at half speed? A. I don't recollect.

Q. Was it as much as a minute do you think? A. About that.

Q. Then I now understand your testimony to be as nearly as you can give it that the pilot blew a whistle signal the first time and one minute later gave the order to stop the engines and after a
670 lapse of another minute he gave the order for half speed ahead, and after the lapse of a third minute he blew his one whistle signal again; is that right? A. Yes.

Q. After the pilot had given the signal of one whistle a second time, what was the next order to the engine-room? A. Stop.

Q. How long after the second whistle signal was the order to stop given? A. About a minute.

Q. Was there any further signal to the engine-room given after this order to stop? A. Yes, to
671 back at full speed.

Q. How long afterward in point of time did this occur? A. A minute or a minute and a half.

Q. Was the collision already inevitable in your judgment when the order to reverse the engines was given? A. No, I don't think so.

Q. I understood you to testify in your direct examination that the pilot ordered the engines to be reversed when he saw the collision was inevitable; was that your testimony? A. I thought
672 that was what he thought.

Q. You have spoken of the order to starboard the helm about the time when the engines were stopped the first time; I wish to ask you whether you know how long the helm was held a-starboard before any other order to the helm was given? A. I don't know.

Q. Do you know whether there was any other order given to the helm? A. I do not.

673 Q. Do you know whether or not the helm was still over to starboard up to the time the collision happened? A. I do not.

Q. Did you see any change of course on the part of your ship after the order to starboard the helm was given? A. Yes, I remembered the ship swinging a little to starboard.

Q. How much do you think she swung? A. About ten degrees; ten to fifteen degrees.

674 Q. That would be a point to a point and a half, would it? A. About a point.

Q. When you speak of the vessel swinging a point, are you considering a swing up to the time of the collision, or did she stop swinging before? A. She swung to starboard slowly; she didn't do it all at once.

Q. How far away were the tug and floats when the order to starboard the helm was given? A. About three-quarters of a mile.

675 Q. How far away were the tug and floats when your steamer had finished swinging one point to starboard? A. Perhaps a half a mile; I can't say exactly.

Q. At this distance of half a mile after your ship had made a turn of one point, how did the tug and floats bear from you? A. A little on the port hand and ahead.

Q. How much on your port bow as nearly as you can tell? A. About a point.

676 Q. Wouldn't it be more than a point? A. No, my idea of it was about a point.

Q. Did you come to this country for the purpose of testifying in this case? A. Yes, I did; I belong on the *Bretagne*.

Q. When did you reach this country? A. Saturday morning.

Q. You came to this office and talked over the facts of this case, didn't you? A. Yes.

Q. When did you come? A. To-day.

677 Joseph Le Guillou.

Q. Haven't you been at this office before to-day? A. Yes.

Q. When before to-day were you here at this office? A. Day before yesterday.

Q. Who did you talk over the facts of the case with? A. Mr. Kopf, Mr. Nolan, the commandant, Mr. Stetson.

Q. Was the story of this collision read over to
678 you so as to bring it up fresh to your recollection? A. No.

Q. Didn't you read over any papers when you were here, about this collision? A. Yes, there was a paper there.

Q. What was it? A. The report made by the other parties against the *Bretagne*.

Q. Do you mean the libel? A. Yes, it was the particulars of the complaint.

Q. Didn't you read over some account of this
679 collision that was taken a year or two ago? A. Yes, there was some sort of a paper.

Q. What was it? A. It was the report the commandant made.

Mr. Brown: I call for the production of the report read by the witness.

The report is produced.

Q. Was this report of the captain read over to you or did you read it yourself? A. It was read over to me.

680 Q. Did you look at it? A. (Examining paper.) I don't know whether that was it, but I think it is.

Q. When you first saw the *Narragansett* and her floats which sides of them did you see? A. Their own starboard sides.

Q. When you came to the office here the first thing was to read over this report of the captain to you, and ask you whether that was all right? A. Yes.

Q. And you said it was all right? A. Yes, for me, that was what happened.

Q. Were you asked any more questions than that? A. No.

Mr. Brown: I ask that this report be marked for identification, Libelant's Exhibit B of April 11th, 1906.

Q. Was that portion of the captain's statement read to you which says that at the same time when the pilot first blew the whistle that he gave the 682
order hard starboard?

Mr. Nolan: Objected to as the captain's report is not in evidence.

A. I don't recollect.

Q. Isn't it true that the order given by the pilot was an order hard-a-starboard? A. I don't know because I don't understand English.

Q. Did you hear any order at all given to the wheel? A. I heard that order given by the pilot 683
and saw him make a gesture with his hand.

Q. Was any order in French given to the man at the wheel? A. Yes, tribord.

Q. To whom was that order given? A. Mr. Roch who was at the telegraph.

Q. With reference to the whistles, when was the order to the helmsman in French given? A. It seems to me that the first blast of the whistle had been already given.

Q. Was it between the two blasts of the whistle 684
that you heard this order given? A. It seems to me it was right away as soon as the first blast of the whistle was given.

Q. Wasn't the order you heard in French hard-a-starboard? A. I know it was put astarboard, but whether it was put hard-a-starboard I can't say.

Mr. Brown: Won't you translate that literally?

The Interpreter: He said astarboard

685 Joseph Le Guillou.

then I said har-a-starboard, and he said hard-a-starboard I think; that is he said, "I don't know, it was put astarboard."

Q. Were the diagrams in the margin of the captain's report shown to you day before yesterday? A. No.

Mr. Nolan: Claimant's counsel calls at-
686 tention to the fact that this examination is being conducted by counsel for libelant by reference to the captain's report, which has been marked for identification only.

Q. When you were here day before yesterday, did you have any practice in placing the models at the time you first saw the tug and floats and at the time of the collision? A. Yes.

Q. When you first placed them day before yes-
687 terday, didn't you put them in little different positions from what you did to-day? A. I don't know the chart well enough to put them in any given place.

Q. Didn't you put the vessels with reference to each other in a different position relatively day before yesterday than you have put them to-day? A. No.

By Mr. Nolan:

Q. When the pilot gave the order to put the helm
688 to starboard, did he not also wave his hand in giving the signal as well as speak it out? A. Yes, he made a gesture to starboard.

Respondent's counsel calls upon counsel for libelant to state whether he intends to offer the captain's report in evidence.

Counsel for libelant states that he will be governed in his decision upon this point by the character of the testimony given by the captain, if he is called as a witness.

Mathurin Le Louarn. 689

MATHURIN LE LOUARN, being duly sworn and examined as a witness for the claimant, testifies as follows, through an interpreter:

By Mr. Nolan:

Q. What is your age? A. 30 years old.

Q. Your occupation? A. I am a seaman.

Q. Will you state what was your occupation on the 17th of March, 1904? A. I was on the bridge of *La Bretagne,* at the siren. 690

Q. Were part of your duties also as lookout on the bridge of *La Bretagne?* A. I was there to attend to the siren when it was necessary to whistle; I wasn't lookout.

Q. Do you recollect what time you left the dock on the morning of the 17th of March, 1904? A. 10 o'clock in the morning.

Q. What side of the channel was *La Bretagne* on going down the Bay that morning, if you know? A. She had to be on the New York side in leaving, 691 but as we got further down she was over on the Jersey side.

Q. Do you know at what rate of speed about she proceeded? A. The engine was at half speed.

Q. Do you recollect the collision *La Bretagne* had with the tug *Narragansett* and two floats? A. Yes.

Q. About where did that collision take place? A. Before arriving down at the Statue of Liberty.

Q. About how far away was the tug and its two carfloats from *La Bretagne* when you first saw it? 692 A. When the pilot whistled they were about a mile off, when he whistled the first time.

Q. How did they bear towards *La Bretagne?* A. We saw them a little on the port hand about half a point; they were coming up towards us; they were meeting us.

Q. Which side of the tug or the carfloats did you see on your port hand? A. Her starboard side.

Q. Could you see both the carfloats and the tug?

A. No, at first we could only see the lighter, the float and the end of the chimney of the tug.

Q. Did you observe any lookout stationed on the carfloats or the tug? A. I didn't notice.

Q. Will you now state as fully as you can just what occurred with reference to *La Bretagne* and this tug and carfloat from the first time you saw the tug and the floats until the time of the collis-
694 ion? A. We saw the lighters ahead of us a little on the port side; the pilot himself blew a whistle, and he ordered the helm starboarded after he whistled; the ship swung a little to starboard and the floats with the tug turned a little to their own port hand; seeing that the pilot gave a second blast of the whistle and after the second blast of the whistle he had the engines stopped; the lighters came on towards us and the collision took place when we had backed at full speed.

695 Q. Tell what occurred when *La Bretagne* hit the lighters? A. The cars on the lighters got off their tracks and went overboard into the water.

Q. When the pilot after blowing the first whistle gave the order to starboard the helm did he motion with his hands to starboard as well as give the spoken order? A. Yes, he did.

Q. Were you given any orders as to giving signals on the siren? A. No, the pilot blew his own blasts.

696 Cross-Examination by Mr. Brown:

Q. Did you have anything to do at all from the time your ship started out from the dock until the collision occurred? A. No, I had nothing to do since it was the pilot who worked the whistle himself instead of speaking to me.

Q. How did you happen to notice the tug and two floats with which you afterward collided? A. It was the whistling called my attention to it.

Q. You hadn't noticed the tug and floats until

the pilot blew his whistle, and then you looked up and saw them? A. That is correct.

Q. In leaving your dock and coming down the North River did you keep on the New York side until you got down past the southerly end of Manhattan Island (witness being told that the part New York is on is Manhattan Island)? A. I don't recollect.

Q. Do you often steer coming out of New York Harbor? A. No, not in the harbor.

Q. Did you notice that shortly after passing the southerly end of Manhattan Island your ship made a turn to the eastward before you got down to the Statue of Liberty? A. I didn't notice.

Q. Did the pilot give only one order to the wheel or more than one? A. I don't know.

Q. You have mentioned an order to starboard the wheel; you remember distinctly that order do you? A. Yes, I do.

Q. Do you remember distinctly any other order that the pilot gave beside that? A. No, I don't.

Q. Was the order that you remember distinctly an order simply to starboard the wheel or an order for hard-a-starboard? A. I don't know.

Q. Then you don't remember it very distinctly do you? A. He said it in English and—— (witness makes gesture with his hand).

Q. What word in English did the pilot use? A. I don't speak English and he didn't speak French.

Q. Why do you think the pilot's order was to starboard? A. By the sign he made with his hand.

Q. Did the pilot speak directly to the man at the wheel? A. I don't know whether he communicated with him through the commandant or not.

Q. You have a very vague recollection of this entire subject haven't you? A. Yes.

Q. Did you see the ship begin to turn right away after the order to the wheel? A. Yes, she changed.

701 Q. How much did your ship turn towards the New Jersey shore at that time? A. About a point.

Q. Did you make that turn quickly? A. Very slowly.

Q. How long were you in turning that point do you think? A. I didn't notice the time; I don't know.

Q. Should you say it would be a half a minute
702 or more or less? A. It wouldn't be more than half a minute.

Q. At the end of that change of one point in which direction did the tug and float bear, if you noticed them? A. On the port hand crossing our course a little.

Q. How much on your port bow? A. About half a point.

Q. Wouldn't it be more than half a point at that time after you had made your turn? A. No, since
703 she was heading that way herself, coming that way.

Q. You think it could not possibly have been more than half a point then, do you? A. I didn't have a compass in my hand, but I should say about half a point.

Q. When you first saw the tug and floats didn't you say that the tug was already swinging a little towards the New Jersey shore, tug and floats together? A. Yes, they were swinging to their own port hand a little.

704 Q. Was that easily seen the very first time you looked at them? A. I only saw them when they whistled to maneuver.

Q. But I am asking you whether it was perfectly easy to see that the tug and carfloats were under a swing towards the New Jersey shore when you did look and saw them? A. It wasn't seen easily, but it was seen.

Q. There was no order on your ship given to the engines until after the pilot blew the second

signal whistle was there? A. As soon as the second blast of the whistle was given the order was given to stop the engine. 705

Q. That doesn't answer my question? A. Before that no order.

Q. After the engines had been stopped pursuant to that order was another order given for half speed ahead again? A. I don't know.

Q. After the engines had been stopped for a short space of time didn't the pilot give an order for full speed ahead for a while? A. The only order I know he gave was that to back at full speed astern. 706

Q. Do you intend to testify that there was no such order or do you intend to testify you don't know whether or not there was? A. I don't know of any such order.

Q. Do you know anything about the order for full speed astern? A. Yes. 707

Q. How soon after the order for the stopping of the engines did that come? A. One minute, two minutes after.

Q. How soon after the order to stop the engines did the collision happen? A. About three minutes.

Q. How far away do you think the tug and floats were when the engines were reversed? A. Four or five hundred metres.

Q. How far when the order to stop the engines was given? A. It was one minute before that. 708

Q. What would be the distance at that time as well as you can estimate it? A. I couldn't estimate that distance.

Q. How is it you have been able to estimate the distance at the time your engines were reversed and at the time of the first whistle signal? A. I couldn't be looking always; I wasn't looking at the time.

Q. Do you know what the estimate of the navi-

gating officer of *Bretagne* was as to the distance of the tug and floats when first seen? A. No, I do not.

Q. Haven't they told you what their estimate was? A. I don't know.

Q. You were here day before yesterday with Guillou? A. Yes.

Q. And the report of the captain about the
710 events of this collision was read over to both of you wasn't it? A. Yes.

Q. In your testimony given to-day haven't you desired to give testimony in accordance with the statements made by the captain?

Objected to as the captain's report is not in evidence.

A. I am trying to tell here to-day what I saw.

Q. Haven't you talked over your estimates of
711 distances with the other witnesses who have been examined to-day? A. No.

Q. You knew the others were going to estimate the original distance about a mile, didn't you? A. No.

Q. Didn't you know the others were going to estimate that the tug and floats were seen half a point on your port bow at first? A. They didn't say anything to me about it.

Q. Did anybody else say anything to you about it? A. No, sir.

712 Q. As a matter of fact, until you put your wheel to starboard, weren't that tug and those floats almost exactly ahead? A. They were ahead of us, yes, but we saw them a little on the port hand.

Q. Weren't they so nearly ahead it was hard to tell whether they were on the port or starboard bow? A. It was difficult, as we swung but a point we saw them on our port hand.

Re-Direct Examination by Mr. Nolan:

Q. After the two signals were given to which

713 you have testified by the siren on *La Bretagne,* did you hear any answer from the tug? A. I had no knowledge of any.

Q. When you first saw the tug and the two floats with which *La Bretagne* afterward collided, did you see any other tug and floats to the rear of it? A. Yes.

Q. About what was the distance between the tug and floats with which *La Bretagne* collided and this other tug and floats? A. I can't say.

714 Q. How did this second tug and those floats bear towards *La Bretagne?* A. They were in front of us, but at that time I didn't notice which bow they were on.

Claimant's Ex. 4.

Deposition of witness, YVES MORICE (Chief Quartermaster) Mail Steamer *La Bretagne*:

715 Q. Where were you at the time of the collision? A. I was at the wheel, at my post for maneuvering.

Q. At what place and at what hour did the collision take place? Upon what date? A. After passing the Statue of Liberty; at 10.35 o'clock on the morning of March 17th, 1904.

Q. How many lighters were there? A. There were two lighters with cars.

Q. Were they being towed? A. They were being towed.

716 Q. How were they being towed? A. Side by side, the tug on the outside.

Q. How did you see the lighters? A. A little on the port hand making a course converging a little towards ours.

Q. What was the speed of the engines at the moment when the lighters were seen? A. Half speed ahead.

Q. What was the speed of the engine at the moment of the collision? A. Full speed astern.

717 Yves Morice.

Q. Was the horizon hazy and how far could one see? A. It was very clear and one could see perfectly well.

Q. Where was the captain at the moment of the collision? A. On the bridge.

Q. Was the pilot on board?—where was he? A. Yes he was at the middle of the bridge.

Q. Who ordered the maneuver before and at
718 the moment of the collision? A. The pilot.

Q. Did not the master intervene during the manœuvre? A. I do not know.

Q. What were the sonorous signals and the maneuvers made by *La Bretagne?* A. The pilot had the engine stopped immediately after he had the wheel put "hard-a-starboard" (in English this would be "hard-a-port"), after having given a blast on the siren; the lighters' tug did not reply; he sounded the siren a second time; the
719 tug did not reply, the pilot gave the order to back at full speed and to put the wheel "hard-a-port" (in English this is "hard-a-starboard"), and the wheel remained "hard-a-port" (in English "hard-a-starboard") until after the collision.

Q. What is the name of the lighter collided with? A. I do not know.

Q. Was assistance rendered to her? A. Some tugs belonging to the port came.

Q. Did you remain a long time at the place of the collision? A. About twenty-five minutes.

720 Q. Were there any accidents to persons? A. No.

Q. You have nothing more to call attention to which concerns the collision? A. No.

On board, the 18th March, 1904.

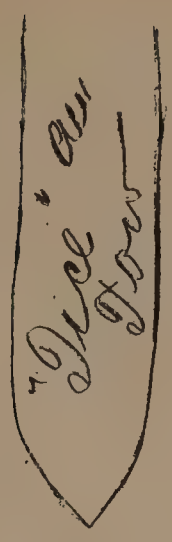
(sd.) 2nd Lieutenant Guimont — The Witness Morice.

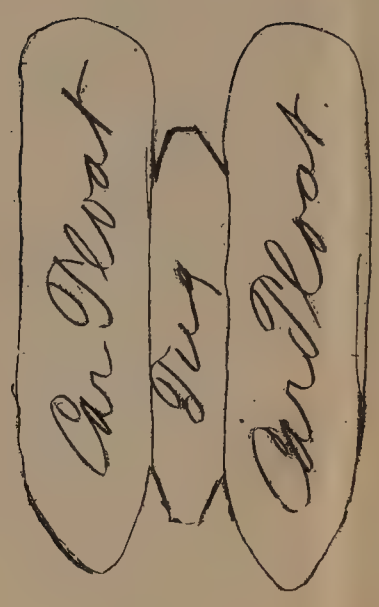
"Seen,"
The Captain,
Poncelet.

Claimants Exhibit A
May 7/06

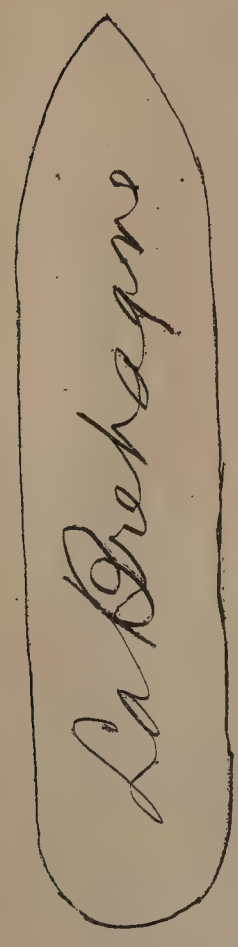
Cor Float
Tug
Cor Float

La Bretagne



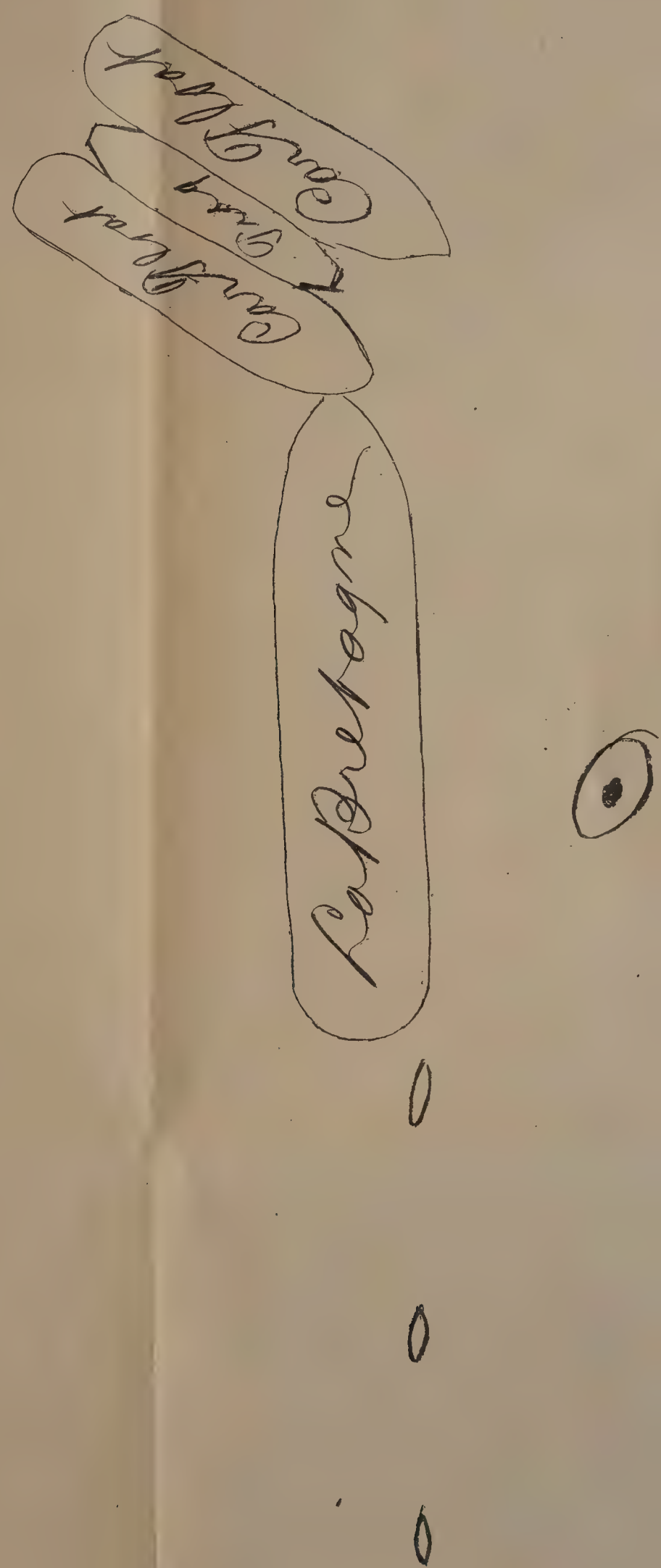


Claimant's Exhibit B
May 6 7/06



(1)

Clamantia Echibee – C
May 7/06



 Claimant's Ex. D.

March Mr. Sullivan Steamship *La Bretagne* Collision. 733

Bound to sea 17th, clear. Ebb tide (2 1/2 hrs.). About 10:40 A. M.—Abreast of Liberty Island—Tow of two carfloats being on my port bow about half a point, bound up.—I signalled one blast, we were going half speed, say eight to nine knots.—No reply, but she, the tow, changed position so that I thought she had ported. I ordered full speed ahead, all appearing to be clear. The tow sheered to westward again; ordered engines 734
slowed and gave one blast, when tow straightened up and came right for us and gave alarm whistle. We reversed full speed and blew alarm signal, but we could not overcome the momentum of the vessel and tide and came together. Stopped to examine and finding no damage proceeded to sea—one of the barges sunk soon after—no lives lost—just as we came together the tug backed out with no one on board and was picked up by another tug.

735

I certify that I have compared this copy with the recorded report of Pilot Michael Sullivan and it is correct.

D. A. Nash,
Secretary Pilot Commissioners.

August 23/04.

Claimant's Ex. E.

Report upon the collision which occurred between *La Bretagne* and a lighter laden with cars belonging to the Baltimore & Ohio Railroad Company. 736

March 17th, 1904, *La Bretagne* left her dock at the scheduled hour and as soon as she was in the middle of the river pilot Sullivan took charge.

I overlooked his orders as usual, reserving to myself to intervene if they should appear to me incapable of execution or dangerous.

The coming down (the harbor) as far as the Statue of Liberty took place without incident. At

737 that place we were keeping the right of the channel close to the Five Meter Shoals and to vessels or lighters anchored off the Bank. Ahead of us and coming to meet us were two convoys of lighters. The one farthest away was composed of two lighters towed tandem. The other of two lighters of cars of the Baltimore & Ohio Railroad Company made fast to each other with a tug alongside. On the port hand a certain number of lighters in tow, a ferry boat, and some tugs en-
738 cumbered the channel as they always do but they still left sufficient passage for us.

The convoy of lighters of the Baltimore & Ohio Railroad Company was a little on our port hand (depositions Le Guillon, Morice at the wheel) and was slightly crossing our course (depositions Le Mashe, Roch, Le Guillon and Morice).

We were then going at half speed (unanimous depositions) I supposed that the place being more free on the port hand and in view of the nearness
739 of the shoals and of the anchored vessels, we were going to come to port and I went towards the pilot to ask him if such was his intention, when suddenly without warning me, without speaking, (the depositions are unanimous) pilot Sullivan seized the cord of the siren and gave a short blast (I am going to starboard or I will keep the right of the channel, Article 19 and 28 of the Rules as to collisions). At the same time he ordered "hard-a-port" (which means starboard, the orders were addressed to the men at the wheel) and
740 with a gesture of the right hand confirmed his order executed by Morice, the man at the wheel.

The ship swung a few degrees while I was surprised at that maneuver (depositions of Le Mashe, and Roch), asked the pilot "why do you come on starboard there is plenty of room on the port side"? Sullivan replied with a gesture signifying that I should not get excited "all right, Captain" then he ordered "steady" and "stop." The engine was stopped at once and the helm put

amidships. The towboat of the convoy did not reply to the blast of the whistle and kept her course which was a little oblique to ours, which put her right ahead of us. In my opinion there was still time to come hard to port, but, to do that it would have been necessary to be sure that the towboat obeying our blast of the whistle tardily, although whether through forgetfulness, carelessness, or lack of looking out, she had not replied to it, would not finally come to starboard and then if a collision had occurred it would have been entirely chargeable to the lack of observance of the requirements of the Articles cited above. 741 742

Besides our respective courses and positions brought us under Article 19 of the Rules and seeing *La Bretagne* on her starboard side the towboat should have changed her course and gone to starboard.

As to us we should not, in any case, especially after the whistle, go to port. Such was my reasoning while regretting the inopportuneness of the sonorous signal the danger of which I foresaw; 743

Such must have been the idea of the pilot who supposed that he would not be able to avoid the other convoy of lighters which has us a little on her port hand. We would, therefore, have remained stopped and with the same heading waited for the towboat to announce her evolution. A second time to my great surprise and under the same conditions as the first time (depositions Le Mashe, Roch, Le Louain, Guillon), the pilot himself gave a blast of the siren and swung the ship to starboard. I questioned him quickly and obtained the same reply. He had the helm put amidships; then seeing that the towboat did not only not reply, but swung to port I said "we must back astern full speed" (depositions Le Mashe and Roch), the pilot replied "yes, full speed astern." The telegraph was put "full speed astern" several times, the engine-room understood the order very well, executed it and replied 744

745 by the speaking tube "back as quick as possible" (deposition Roch). At the same time I had the forward water tight bulkhead closed but it was too late and *La Bretagne* collided almost perpendicularly with lighter *No. 180 N* of the convoy the towboat of which finally seeing the danger stopped and backed.

Our speed was so little that the lighter was not cut in two, that the lighter *No. 67* with the towboat alongside received no damage and that we
746 stopped on the spot. But the shock caused the cars to slip upon their track and a certain number of them, 6 or 7, fell into the water. These cars which were probably empty floated around us as well as the lighter which must have leaked and which listed over slightly to port. The other lighter and the towboat separated themselves from us and continued their course. We got clear of the floating cars and then stopped. The pilot having again personally given several short blasts
747 of the siren numerous towboats hastened to us and occupied themselves actively with the cars and the lighters and took them in tow (depositions are unanimous).

From this point of view and to conform to the prescriptions of the law of March 10th, 1891, and those of the American law of December 15th, 1890, our nationality, our ownership, and our name were sufficiently known, and aid which we might have been able to render was so insignificant and useless compared to that given by the
748 towboats that we had no need to remain long at the place of the collision.

Nevertheless, in order to neglect nothing so as to have the law on our side, I several times interrogated the pilot Sullivan in the presence of Messrs. Le Mashe and Roch who understand English (depositions of Le Mashe and Roch), and I asked him the two following questions:

1st.—Ought I to anchor and go and make my report to the American authorities?

Reply—No, I will make the report myself. 749

2nd.—In that case can I continue my voyage?

Reply—Yes, unless you have damages which prevent.

Having assured myself personally that the forward part of the ship had suffered no damage, the shock for that matter having been very weak and having taken place almost normally, that soundings of the holds taken at the moment of sailing 750
from the dock, and those taken 20 minutes after the collision showed the same results, I resumed my voyage about 30 minutes after the collision. We went out without further incident and I addressed a letter to the General Agent in New York besides the message T S F, as well as a letter to the Consul General of France. Copies of these sundry documents are annexed to the present report, #2, 3 and 4 as well as a sketch of the place of the accident, #6 and the depositions of the witnesses, #7, 8, 9, 10, 11 and 12 and a copy of 751
my protest #13.

Summing Up.

From the point of view of the rules, *La Bretagne* was altogether right, my former function as a member of the High Wreck Commission having frequently brought me to examine into similar cases. In fact we were keeping the right hand of the channel (article 25 of the Rules). The 752
nearness of the shallows and vessels at anchor on the starboard hand prevented us from coming very much to starboard. Since pilot Sullivan, through a personal initiative which I did not have the time to prevent manifesting itself, had indicated the intention of going to starboard, after the blast of the siren had been given (article 28), it was our duty to maintain our determination of keeping to the right (article 21).

Our speed was moderate and we only ma-

753 neuvered with the engine (article 21), when the collision appeared inevitable (article 21, 27 and 29).

If the two convoys of lighters had kept a better lookout they would have replied to our sonorous signals and according to their reply we would have perhaps had time to go to port and avoid the meeting.

But I insist upon precising, so far as concerns myself, that I did not have time to intervene in
754 order to prevent the pilot, Sullivan, from adopting a course which appeared to me right away dangerous. After his blast of the siren I no longer had the right to take it upon myself to go to port for the reason given, page C and D of the present report.

The depositions of the principal ocular witnesses of the accident are unanimous in confirming my assertions.

It, therefore, seems to me that *La Bretagne*
755 maneuvered in conformity with the Rules, that she cannot be held responsible for the collision which was entirely chargeable to the lack of looking out on the part of the towboat, who, if she was not under control did not carry the signals called for by article 4.

Besides the pilothouse of the towboat being lower than the cars, the master of this towboat who was placed on the other side of the lighters could not see us. Usually in such a case one or
756 several men are put as lookouts on the top of the cars.

Now, it is shown by an affidavit of Mr. Boch, 3rd Lieutenant, corroborating my recollection, that there was nobody on the cars even after the second blast of the whistle; some men came up on the cars after the collision and called out to us, but we were unable to understand what they said.

La Bretagne should, therefore, be discharged. But if pilot Sullivan had not in a certain way,

usurped the command, in that way assuming all the responsibility, and if I had been forewarned of the maneuver which he was intending to make, I would not have consented to going to starboard, and the collision with the first convoy would have certainly been avoided. 757

"Bretagne," March 26th, 1904.

The Captain,

Poncelet.

758

759

760

761 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BALTIMORE & OHIO RAILROAD COMPANY

AGAINST

762 Steamship "LA BRETAGNE," her engines, &c.

Admiralty.—Collision in upper New York Bay, near Liberty Island. The Bretagne held in fault for turning to the right without an agreement for passing in that way, when the vessels were in a position to pass safely starboard to starboard. The libellant's tug also
763 *held for navigating on the port side of the channel in violation of the narrow channel rule.*

BUTLER, NOTMAN & MYNDERSE, for libellant.
EDWARD K. JONES, for claimant.

ADAMS, *J.*:

This action was brought by the Baltimore & Ohio Railroad Company against the steamship *La Bretagne* to recover the damages arising from
764 a collision between that steamship and libellant's carfloat *160 N*, in tow on the starboard side of the tug *Narragansett*. The float was laden with 14 cars, 9 of which were forced overboard and injured, with their contents. The damage is alleged to have amounted to $30,000. The collision occurred near Liberty Island, New York Harbor, between 10 and 11 o'clock in the morning of the 17th day of March, 1904. The tug had another shorter float, *No. 67*, on her port side, and was

765 bound from St. Georgе, Staten Island, to pier 32 North River. The *Bretagne,* about 550 feet long, was proceeding to sea from her pier at the foot of Morton Street, North River, at the rate of from 8 to 10 miles an hour. The tug was 95 feet long, the starboard float about 300 feet long and the port float was about 200 feet long. The sterns of the floats were somewhat, 15 or 20 feet, aft of the stern of the tug. They both projected considerably ahead of the tug, the starboard one at least 150 feet. She was proceeding at the rate of 766 4 or 5 miles per hour. The weather was fair and the tide ebb.

The claim of the libellant is that the *Narragansett* and tow were proceeding up the extreme side of the channel, close to the anchorage ground in order to escape the current of the ebb tide, and the *Bretagne* was coming down the middle of the channel, bound to sea, and the vessels as they approached were bearing on the starboard of each other; that when a comparatively short distance 767 apart the steamer blew a signal of one blast, hard-a-ported her wheel and took a rank sheer to the westward, bringing about the collision by the steamer striking with her stem the starboard float on her starboard side, about a third of the length of the float from the forward end, seriously injuring one float and causing her to sink to the water's edge and the nine cars mentioned to run off the rails and overboard; that the collision occurred, notwithstanding the efforts of the tug to 768 avert it by blowing danger signals and reversing her engines full speed. The steamer is alleged to have been in fault, (1) in not maintaining a vigilant lookout, (2) in proceeding at too high a speed and in not seasonably slowing, stopping or reversing, (3) in not continuing on a course calculated to carry the vessels safely past each other starboard to starboard, and in attempting to cross the bow of the *Narragansett* when the vessels were too close together to permit such a maneuver to be

769 safely made, and (4) in not taking seasonable measures by the use of her whistle or otherwise to pass the *Narragansett* and her tow in safety, and in not seasonably indicating her intention of porting her wheel and passing to the westward.

The claim of the *Bretagne* is that she left her pier at 10 o'clock in the morning, under the charge of a duly licensed pilot stationed on the bridge where she also had her commander, with a full corps of quartermasters and able seamen properly
770 stationed and all attentive to their respective duties; that she proceeded down the channel without special incident until she neared the Statue of Liberty, keeping at that point to the right of the channel on a course of S. S. W. and while thus proceeding, and at half speed, those in charge of her navigation noticed about three quarters of a mile ahead and about one-half point on her port hand, the tug and her tow of two carfloats; that the *Bretagne* then gave a signal of one blast to in-
771 dicate to the tow that she would pass on the port side and went to the starboard a few degrees, but her signal was not answered; that when the vessels were about 1,200 feet apart, the tug changed her course across the course of the *Bretagne,* whereupon the latter's engines were slowed and he gave another blast of her whistle and swung further to the starboard; that the tug without answering the signal of the *Bretagne,* proceeded across the latter's course, whereupon she reversed her engines full speed and gave the alarm signal,
772 but before her speed could be fully arrested, the vessels collided. The *Bretagne* alleges as faults on the part of the tug, (1) she did not maintain a proper lookout, (2) she wrongfully attempted to cross the bows of the *Bretagne,* (3) she omitted to turn to her starboard, (4) she refused to yield to the *Bretagne* and persisted in crowding the latter in her efforts to pass along the starboard side of the channel, and (5) she omitted to slacken her speed and stop and reverse in time.

The testimony on the respective sides supports 773
the contentions in a general way, but outside testimony makes it clear that the vessels were on courses to pass safely starboard to starboard, if neither had changed. Such testimony comes from several tugs navigating in the vicinity. The *Nettie Tice* was going up the channel astern of the *Narragansett,* towing 3 coal laden canal boats, bound from Elizabethport, New Jersey, to Jersey City. Her master said that the *Narragansett* passed her on the port side, on a parallel course; 774
that the *Tice* saw the *Bretagne* approaching head and head with herself and broad on the *Narragansett's* starboard on a course shaped to pass fully a thousand feet to the eastward of the latter's course; that at this time the *Tice* blew the *Bretagne* a signal of one whistle and a few seconds afterwards the latter blew a similar signal; that then, after proceeding about a length, the *Bretagne* started to sheer to starboard and approached the *Narragansett,* whereupon the latter blew danger signals, 775
which were immediately followed by similar signals from the *Bretagne* and both vessels reversed, but too late to avoid the collision. The effect of the reversing was to bring the *Narragansett* to a substantial stop in the water, but was not sufficient to fully stop the headway of the *Bretagne,* which aided by the tidal current, was going forward at the time of the impact. The master of the Tug *Overbrook,* proceeding up the Bay and having passed between the vessels, corroborated this account, except as to the distance there would have 776
been between the *Bretagne* and *Narragansett* in passing. He estimated it at 500 or 600 feet. The Tug *Independent,* heading about south, was passed by the *Bretagne* on the tug's port hand. The Master saw the vessels in collision near the anchorage grounds and attributed it to a sheer on the *Bretagne's* part. The Tug N. Y. Central *No. 10* was taking a lighter from the Erie Basin bound up the North River. The Master saw the

777 *Bretagne* coming down off Castle William, and the *Narragansett* going up to the westward. He heard the danger signals and noticed a change of course on the part of the former to the westward of about four points, bringing about the collision. The Tug *Charles Runyon* was coming up the Bay from Barren Island to the North River, slightly to the starboard of the *Tice* and about 1,000 or 1,200 feet to the eastward of the *Narragansett.* The master saw the *Bretagne* coming down on a course
778 parallel with that of the *Narragansett.* He heard the *Tice's* signal of one whistle and the steamer's answer, then saw the latter haul sharply to the starboard and rather exaggerated her sheer, which he said was almost across the channel. He then saw the collision. There were numerous other witnesses from these outside vessels in Court, but the advocate for the *Bretagne* objected to their examination as being merely cumulative and stipulated that their testimony would agree with
779 that already given, whereupon the *Narragansett* agreed not to examine them.

The testimony of the pilot of the *Bretagne* was that when he saw the tug and the floats they were slightly on his port hand, about one-half point, and headed to pass in that way; that the steamer, then off Bedloe's Island, was slowed and blew a signal of one whistle; that the *Narragansett* did not respond to the whistle, but sheered slightly to the starboard and showed the port side of the western float, whereupon he ordered the steamer
780 to proceed at half speed again; that everything then appeared clear, and the steamer went on, when suddenly the tow took a sheer to the westward, the steamer then blew one whistle and slowed and immediately afterwards reversed, but the collision took place 200 or 300 feet to the eastward of the anchorage buoys. This contention was not fully sustained by the Master who was on the bridge, who said he saw the starboard side of the tow looking as if it was trying to cross the

steamer's bow and go to the western part of the channel, and he asked the pilot "Why do you come to the starboard?" The Master evidently regarded a wrong maneuver the steamer's change to the right under the circumstances, but subsequently appeared to agree with the pilot and did not relieve him of the command. His testimony was practically the same as the pilot's with respect to the positions of the vessels, and the other witnesses for the steamer sustained, in a general way, the pilot's contention. 781 782

The great preponderance of the testimony shows that the vessels were in positions to pass safely starboard to starboard, and that the collision was produced by a change on the part of the *Bretagne* to the starboard, without an agreement to that effect with the tug. I had no doubt of this at the time of the trial and an examination of the minutes of the testimony confirms my belief that she was primarily in fault for the collision. The *Narragansett* did not have a lookout, but it appears that the accident did not occur by reason of the absence of one, and such circumstances should be disregarded. 783

The troublesome feature of the case is the fact that the tug and tow were on the wrong side of the channel under Art. 25, which provides that in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

The channel here was about 4,500 feet wide. I have had occasion to conclude in several cases recently (verbal opinions delivered in Court) that the Hudson River opposite New York, where it is about the same width, was within the rule. It has been stated on appeal in *The Bee,* 138 Fed. Rept., 303, 306, referring to a collision occurring off Bay Ridge, where there are two channels, that the rule did not apply when the channels made an entire body of water, though it does with 784

785 respect to each channel further down the Bay, when they are separated. In the vicinity of this collision, there was but one channel, that is the main one, in which both vessels were navigating. No reason appears why the rule should not be applied in this case, unless the circumstances were such as to exclude its operation. It was urged that the proximate cause of the collision was the sheer of the *Bretagne* to the starboard, and the *Lowell M. Palmer,* 142 Fed. Rept., 937, is cited
786 to sustain the proposition that she should be held solely liable. That was a case of collision in the East River where the tug *Wrestler,* starting from New York and bound up the river with a tow alongside, brought about a collision with a descending tow, alongside of the tug *Lowell M. Palmer,* near the Brooklyn shore. In that case there was a two whistle agreement which required the *Wrestler* to pass the *Palmer* starboard to starboard, which the former failed to comply with,
787 alleging that she found it impossible, because of an eddy which prevented her bow from swinging up the river. The Court, however, disregarded this excuse of the *Wrestler* and held her solely in fault. It was concluded that the *Palmer* was not in fault because the *Wrestler* could not complain of a violation of law on the part of the *Palmer,* as there was ample opportunity for the vessels to execute the maneuvre agreed upon, the *Palmer* having gone as near to the Brooklyn shore as safety would permit. The principal distinction between
788 that case and the one under consideration is that there was no agreement to pass to the right. The *Bretagne* sought to make such agreement, but it was not assented to by the tug, which did not answer the former's navigating signals, but stopped and backed upon receiving the signal of the *Bretagne* and seeing her sudden sheer. The tug was aided by the tide in her efforts to stop, and probably had overcome her headway at the time of the

collision, so that there was no observable fault on her part, except that of being on the wrong side of the channel. 789

Of the Narrow Channel Rule, it is said in Hughes on Admiralty (250):

> "This is really a branch of the port-helm rule. The latter rule applies when the vessels are meeting end on, no matter whether they are in a harbor or in a narrow channel, no matter whether they are following a channel or crossing it. The starboard-hand rule em- 790
> phasizes this duty as to narrow channels. It means that each must keep along its own right hand side, no matter how the relative bearings may be from sinuosities or other causes.
>
> This rule was only added to the inland rules by the recent act of June 7, 1897, though it had been in the International Rules since the revision of 1885. The Courts, however, are rigid in enforcing it." 791

Of course, if there had been an agreement to go to the left the *Bretagne* would be solely liable under *The Bee, supra.* In the absence of such an agreement, I am unable to see how the *Narragansett* can be wholly exonerated. Her presence on the western side of the channel was clearly a contributing fault, because if she had been where the law required her to be there would have been no collision.

Decree for the libellant with half damages, with an order of reference. 792

Oct. 30, 1906.

793 At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms in the Post Office Building, Borough of Manhattan, City of New York, on the 21 day of December, 1907.

PRESENT:

794 Honorable CHARLES M. HOUGH,
District Judge.

BALTIMORE & OHIO RAILROAD COMPANY CAR-FLOAT "160 N.," &c.,
Libellant,

AGAINST

795 Steamship "LA BRETAGNE," her engines, boilers, etc.,
Claimant.

Final Decree.

An interlocutory decree having been made and entered by this Court in the above entitled cause on 10 November, 1906, whereby it was adjudged that the collision mentioned in the libel was due to the mutual fault of the Steamship *La Bretagne,* and of the steamtug *Narragansett,* and that the
796 libellant recover from said Steamship *La Bretagne* and her stipulators one-half of the amount thereon, together with one-half its cost, and of the damages by it sustained, with interest whereby it was further ordered that it be referred to Herbert Green, Esq., Commissioner, to ascertain and compute the amount of libellant's said damages sustained by reason of said collision;

And said Commissioner having duly filed his report bearing date 11 December, 1907, whereby

he finds the total amount of libellant's damages 797
to be Twenty-seven thousand four hundred and one 85/100 Dollars ($27,401.85) and the interest due thereon to and until 11 December, 1907, to be the further sum of Five thousand seven hundred and twenty-two 02/100 Dollars ($5,722.02) making in all Thirtythree thousand one hundred and twenty-three 87/100 Dollars ($33,123.87);

And an order of this Court, upon consent of Proctors for the respective parties, having been duly entered herein on 12 December, 1907, where- 798
by said Report of the Commissioner was in all things confirmed: Now it is hereby

Ordered, adjudged and decreed that the libellant herein have and recover from said steamship *La Bretagne* and her stipulators Thirteen thousand seven hundred 92/100 Dollars ($13,700.92), being one-half of the total amount of its said damages sustained by reason of the matters and things mentioned in the libel, together with Two thousand eight hundred and sixty-one 01/100 799
Dollars ($2,861.01), being one-half of the amount of interest found due on the total amount of said damages; and together with the sum of Twenty and 83/100 Dollars being interest on said sum Thirteen thousand seven hundred 92/100 Dollars ($13,700.92) from date of Commissioner's said report, 11 December, 1907, to date of entry of this decree; and also together with the sum of Two hundred and eighteen and 32/100 Dollars ($218.32), being one half the libellant's costs, as 800
taxed, making an aggregate sum of Sixteen thousand eight hundred and three and 8/100 Dollars ($16,803.08), with interest on said aggregate sum from the date of entry hereof until paid. And it is further

Ordered, adjudged and decreed that unless the claimant appeals from this decree within the time and in the manner provided by law and the rules and practice of this Court, or unless the decree be sooner satisfied, the stipulators on bonds and

801 stipulations filed herein on the part of the claimant of said Steamship *La Bretagne,* cause the engagements of their stipulations to be performed, or show cause before this court within four days from the expiration of the time aforesaid, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels and lands, according to their respective stipulations.

A. G., Jr. C. M. Hough, *D. J.*

802

The foregoing decree is approved as to form.

—sd— Edward K. Jones,
Proctor for Claimant.

Dated, New York, 21 December, 1907.

[Endorsed:]—Final Decree.—Filed Dec. 21, 1907.

Please to take notice that a final decree, of which the foregoing is a copy, was this day duly
803 entered and filed in the office of the clerk of this Court.

Dated, New York, December 21, 1907.

Yours, &c.,
Wallace, Butler & Brown,
Proctors for Libellant,
Office and Post Office Address,
Number 54 Wall Street,
Manhattan Borough,
New York City.

804

To Edward K. Jones, Esq.,
Proctor for Claimant.

DISTRICT COURT OF THE UNITED STATES. 805

SOUTHERN DISTRICT OF NEW YORK.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Libelant,

AGAINST 806

The Steamship "LA BRETAGNE," her engines, etc., La Compagnie Generale Transatlantique,
Claimant.

SIRS:—

Please take notice, that the claimant herein, the owner of the steamship *La Bretagne,* hereby appeals from the final decree in this action dated the 21st day of December, 1907, and entered herein on the 21st day of December, 1907, to the United States Circuit Court of Appeals for the Second Circuit, to be holden in and for the said Circuit, at the City of New York, in so far as the said decree provides, as follows: 807

FIRST.—That the said steamship *La Bretagne* was at fault for the collision mentioned in the libel in this case. 808

SECOND.—That the libelant recover from the said steamship and her stipulators one-half of the damages sustained by the tug *Narragansett,* with interest therein.

THIRD.—That the said libelant recover from the said steamship *La Bretagne* and her stipulators the sum of Thirteen thousand seven hundred and 12/100 Dollars, being one-half of the damages suf-

809 fered by the said tug *Narragansett*, together with the sum of Two thousand eight hundred sixty-one and 01/100 dollars, being one-half of the amount of interest found due by the Commissioner herein on the total amount of damages sustained by the said tug *Narragansett*, together with the sum of Twenty-two and 93/100 dollars, interest on said sums from the date of the Commissioner's report herein.

810 FOURTH.—That the libelant was entitled to one-half the amount of its costs as taxed.

Yours, &c.,
EDWARD K. JONES,
Proctor for Claimant,
25 Broad Street,
New York City.

To WALLACE, BUTLER & BROWN,
Proctors for Libelant,
54 Wall Street,
811 N. Y. City.
THOMAS ALEXANDER, Esq., Clerk.

[Endorsed:]—Notice of Appeal.—Filed Feby. 8/08.

812

DISTRICT COURT OF THE UNITED STATES, 813

SOUTHERN DISTRICT OF NEW YORK.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Libellant,

AGAINST 814

The Steamship "LA BRETAGNE," her engines, etc., La Compagnie Generale Transatlantique,
Claimant.

The appellant, La Compagnie Generale Transatlantique, owner of the steamship *La Bretagne,* and the said steamship *La Bretagne,* hereby assigns error in the decree of the District Court of the United States for the Southern District of New York, in this cause, as follows: 815

1. The said District Court erred in holding the appellant's steamer *La Bretagne* in fault for the collision mentioned in the libel herein.

2. That said District Court erred in not holding the tug *Narragansett* and her tow solely in fault for the said collision.

816

3. The said District Court erred in not exempting the steamship *La Bretagne* from all liability for any loss arising out of the collision set forth in the libel herein.

4. The said District Court erred in allowing to the libellant herein any costs whatever.

5. The said District Court erred in not allowing the said steamship *La Bretagne* and this appellant their costs in this proceeding.

817 6. The said District Court erred in not dismissing the libel herein with costs to the said steamship *La Bretagne* and this appellant.

7. The said District Court erred in not holding that the cause of the collision herein was the failure of the said tug *Narragansett* to have a lookout on duty at the time of the collision; because she was on the wrong side of the Channel and in the path of outward-bound vessels; because
818 she disobeyed Rule 1 of Article XVIII of the Pilot Rules, in that she failed to answer the blast of the whistle of *La Bretagne*.

8. That the District Court erred in other particulars to be shown on the argument of the appeal herein.

Dated, New York, February 8th, 1908.

EDWARD K. JONES,
Proctor for the Appellant.

819

[Endorsed:]—Claimant's Assignment of Errors. —Filed Feb. 8, 1908.

820

UNITED STATES DISTRICT COURT, 821

SOUTHERN DISTRICT OF NEW YORK.

BALTIMORE & OHIO R. R. Co.,
Libellant,

AGAINST

The Steamship "LA BRETAGNE," her engines, &c.,
La Compagnie Generale Trans-Atlantique,
Claimant. 822

SIRS:

Please take notice that the libellant herein hereby appeals from the final decree made and entered herein on the 21st day of December, 1907, to the United States Circuit Court of Appeals for the Second Circuit, to be holden in and for the said Circuit at the City of New York, January 15, 1908. 823

WALLACE, BUTLER & BROWN,
Proctors for Libellant.

To EDWIN K. JONES, Esq.,
Proctor for Claimant.
THOMAS ALEXANDER, Esq.,
Clerk. 824

[Endorsed:]—Notice of Appeal.—Filed July 3, 1909.

825 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BALTIMORE & OHIO RAILROAD CO.,
Libellant,

AGAINST

826 Steamship "LA BRETAGNE," her engines, &c., La Compagnie Generale Transatlantique,
Claimant.

The libellant above named, appealing herein from the decision and decree of this Court assigns errors therein as follows:

FIRST.—In that the Court held and decided that
827 the collision mentioned in the libel was due to fault on the part of the *Narragansett* as well as of *La Bretagne* and in that it did hold *La Bretagne* solely in fault therefor.

SECOND.—In that the Court held that the waters where the collision occurred constituted a narrow channel within the meaning of Article 25 of the Inland Rules; and in that the Court refused to hold that the position of the *Narragansett* on the westerly side of the waters of the Upper Bay was
828 justified by the undisputed and well recognized custom and by the necessities of commerce and in that the Court refused to hold that it would have been impracticable, within the meaning of the Narrow Channel Rule, for the *Narragansett* under existing tidal conditions to navigate on the easterly side of said waters.

THIRD.—In that the Court held that the *Narragansett's* alleged violation of the Narrow Chan-

nel Rule was a proximate cause of the collision and in that it refused to hold that such alleged violation was an immaterial incident having no connection with the collision. 829

FOURTH.—In that the Court awarded to the libellant a part of its damages and costs only and that it did not award to the libellant full damages and costs.

New York, 15 January, 1908.

WALLACE, BUTLER & BROWN,
Proctors for Libellant. 830

[Endorsed:]—Assignment of Errors.—Filed July 3, 1909.

831

832

833 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Libellant,

AGAINST

834 The Steamship "LA BRETAGNE," her engines, boilers, &c.

It is hereby stipulated by and between the Proctors for the respective parties herein, that the libellant's Exhibit "A" and the claimant's Exhibits 1, 2, 3, 5 and 6 may be omitted from the printed record on appeal; and it is also agreed that the Exhibits themselves may be handed up at
835 the time of the argument, if either party so desires.

Dated, New York, July 26, 1909.

JOSEPH P. NOLAN,
Proctor for Claimant,
WALLACE, BUTLER & BROWN,
Proctors for Libellant.

[Endorsed:]—Stipulation.—Filed.

836

UNITED STATES OF AMERICA,
Southern District of New York, } ss.: 837

BALTIMORE & OHIO R. R. Co.,
Libellant-Appellee,

vs.

The S. S. "LA BRETAGNE," La Compagnie Generale Transatlantique,
Claimant-Appellant. 838

I, THOMAS ALEXANDER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled cause made up pursuant to Rule No. 4 in Admiralty of the United States Circuit Court of Appeals, for the Second Circuit. 839

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 23rd day
[SEAL] of Aug., in the year of our Lord one thousand nine hundred and nine, and of the Independence of the said United States the one hundred and thirty-fourth. 840

THOS. ALEXANDER,
Clerk.

841 [Endorsed:]—U. S. District Court, Southern District of New York.—The Baltimore & Ohio R. R. Co., libellant-appellee, *against* The S. S. *La Bretagne,* The Companie Generale Transatlantique, claimant-appellant.—Apostles.—United States Circuit Court of Appeals, Second Circuit.—Filed Aug. 25, 1909.—William Parkin, Clerk.

842

843

844

Geo. F. Ebert, Law Printer, 113 Nassau Street, N. Y.

United States Circuit Court of Appeals.

FOR THE SECOND DISTRICT.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Libellant-Appellant,

against

The Steamship "La Bretagne," her engines, etc., La Compagnie Generale Transatlantique,
Claimant-Appellant.

BRIEF ON BEHALF OF "LA BRETAGNE," CLAIMANT-APPELLANT.

Statement.

This cause comes before this Court on cross appeals by the libellant and the claimant from the decree of the District Court adjudging the tug "Narragansett," belonging to the Baltimore & Ohio Railroad Company, and the steamship "La Bretagne," belonging to La Compagnie Generale Transatlantique, to be in fault for the collision and decreeing half damages.

"La Bretagne" was not injured by the collision and no claim for damages on her part was made.

The claimant of the "La Bretagne," La Compagnie Generale Transatlantique appeals from so much of the final decree in this action as provides that "La Bretagne" was in fault for the collision herein and that the libellant recover one-half of its damages and one-half of its costs as taxed.

"La Bretagne" was held in fault for faulty navigation, and the "Narragansett" for being on the wrong side of the Channel.

The action arose out of a collision which occurred about 10:40 o'clock in the morning of the 17th of March, 1904, in New York Harbor off Liberty Island, between the tug "Narragansett" and her tows, and the steamship "La Bretagne."

The tide at the time of the collision was ebb, the wind light, southsouthwest, and the weather clear.

"La Bretagne" is about five hundred and fifty feet long and was proceeding to sea after leaving her pier at the foot of Morton Street, North River, at 10 o'clock in the morning. The collision occurred about 10:40. The "Bretagne" was proceeding slowly, just before the collision, and had slowed down several times, and had been proceeding at about eight or ten miles an hour.

The tug "Narragansett" is ninety-five feet long and twenty feet beam, and had lashed to her starboard side Float No. 160-N, two hundred and eighty-six feet long and thirty-six feet beam, and Float No. 67 lashed to her port side, two hundred and five feet long and thirty-three feet beam. The sterns of the floats projected some fifteen or twenty feet aft of the stern of the tug.

The situation immediately previous to the collision, as claimed by the witnesses for the "Bretagne" was as follows:

"La Bretagne" was coming down the westerly side of the main ship Channel. To her port were the tug "Tice" and her tow, some distance ahead, and another tug astern of the "Tice," but somewhat more to the westward (this afterwards proved to be the tug "Charles Runyon"), and the "Narragansett" about a point, or half a point on the port hand of the "Bretagne" and showing at that time both her port and starboard lights. The "Narragansett" and her tow at that time were on a course estimated by the Captain of the "Bretagne" to be N. N. E. The course of the "Bretagne" was the course of the main ship Channel S.W.S. To the starboard of the "Bretagne" at this time was the anchorage ground, on which were verious vessels, the only ones of which that have been described in the testimony are the barge "Moonbeam," about one hundred and fifty feet from the edge of the anchorage grounds; the SS. "Rushington," lying across the edge of the anchorage grounds, and the tug "Brinton." Other tugs, tows and barges were anchored and plying in the vicinity.

The Pilot and Captain of the "Bretagne" both testify that they had followed the course of the main ship Channel until they were about at Castle William, when, perceiving the vessels and the situation which has just been described, and discerning that the "Narragansett" was on a course which, if persisted in, would cross the bow of the "Bretagne," blew a single blast of her whistle and went to the starboard about one-half point. The "Narragansett" straightened up to her starboard, and proceeded a short distance, when she again set over to the westward and a second blast of the whistle was blown. The "Bretagne" went about one-half point further to the westward and then blew her alarm whistles and reversed her engines,

but the ebb tide carried her down into the "Narragansett" and her tow, striking the starboard float just abaft the bow.

The claimant in its answer charges the "Narragansett" with the following faults:

1. She did not have and maintain a proper lookout, and those in charge of her navigation did not see, or if they saw La Bretagne, did not take timely precautions to avoid the collision.

2. She wrongfully attempted to cross the bows of La Bretagne, when it was apparent that she could not do so prudently and with safety.

3. She omitted and failed to seasonably turn to her starboard as she could have done, but on the contrary continued a course which crossed the course of "La Bretagne," and crowded the latter in the Channel.

4. She wrongfully refused to yield to "La Bretagne," and persisted in crowding the latter in her efforts to pass along the starboard side of the Channel.

5. She wrongfully omitted to timely slacken her speed and stop and reverse, as she was required to do by law, when risk of collision appeared.

6. She was otherwise in fault in particulars to be hereafter shown on the trial of this cause.

The District Court has held the "Narragansett" to be in fault for being on the wrong side of the

Channel, and excused her for her failure to carry a lookout, and also excused her for her failure to answer the whistles of the "Bretagne;" has held the "Bretagne" in fault for her sheer to the starboard without an agreement to that effect with the tug (Opinion, p. 196, fol. 782), the Court being of the impression that at the time the "Bretagne" signalled to the "Narragansett" the vessels were in a position to pass safely starboard to starboard.

The situation immediately preceding the collision, as described by the witnesses for the libellant, is as follows:

The "Narragansett" and her convoy were *on the westerly side of the main ship Channel on the edge of the anchorage grounds* and proceeding on a course northeast by north; at anchor on the anchorage grounds was the barge "Moonbeam," about 150 feet from the edge of the anchorage grounds, and the steamship "Rushington" across the edge of the anchorage grounds, about a quarter of a mile astern, lying about northwest; and several other barges (Clarke, p. 20, fol. 79); and under way the tug "Brinton" proceeding to her anchorage berth. To the eastward of the "Narragansett," and also in the main ship Channel, coming up the bay, was the tug "Tice" with three loaded coal barges, two lashed to her port side and one to her starboard side. Astern of the "Tice," and between the "Narrangansett" and the "Tice," was the tug "Charles Runyon" coming up the Bay.

The claim of the "Narragansett" is that while she was proceeding at a speed of about five miles per hour on her course of N. E. ½ N. along the edge of the anchorage grounds, her pilot discovered the "Bretagne" some three or four lengths away and just a little below Castle William, going about

eight to ten miles per hour. The "Narragansett" at that time was abreast of Buoy 15. Her Captain states that the "Bretagne" was from eight hundred to one thousand feet to the eastward of him, or, as he also states it, she was about two and a half points on his starboard hand, heading to the southward. He does not give the course of the "Bretagne" at the time, except as above described. The "Bretagne" when he first noticed her blew a blast of her whistle, took a rank sheer to starboard, estimated by the Captain at some four or five points, and deliberately ran him down. The collision occurred off Liberty Island.

According to the Captain of the "Narragansett" the "Bretagne" did not diminish her speed until the alarm signals of the "Narragansett" were blown, when the "Bretagne" blew her alarm signals and proceeded to stop and reverse. She struck starboard Float No. 160-N about one hundred feet from the bow, cutting into her about ten feet. The result of the collision was to release the loaded cars on the starboard float and send them overboard, causing the damage claimed by the libellants.

The pilot of the "Narragansett" claims that during this time previous to the collision, the "Narragansett" was showing her starboard side to the "Bretagne" and the "Bretagne" was on such a course that, if it had been night, she would have shown her starboard light to the "Narragansett."

At the time of the collision her headway was not quite checked, and the "Bretagne" was going about with the tide two or three miles an hour (Clarke, p. 19, fol. 73).

At no time did the "Narragansett" stop or change her course until, as claimed by her witnesses, the collision seemed inevitable.

The "Narragansett" had no lookout because, as

Captain Clarke stated, there was a custom among the Baltimore & Ohio fleet pilots not to have a lookout in daylight until their vessels passed Castle William (Clarke, p. 127, fol. 508).

The "Narragansett" did not answer the signal of the "Bretagne" because her pilot, as he testified, did not think the whistle was for him (Clarke, p. 18, fol. 69).

The faults charged against "La Bretagne" are as follows:

1. In not maintaining a vigilant lookout.

2. In proceeding at too high a speed and in not seasonably slowing, stopping or reversing.

3. In not continuing on a course calculated to carry the vessels safely past each other starboard to starboard, and in attempting to cross the bow of the tug Narragansett when the vessels were too close together to permit said manœuvre to be safely made.

4. In not taking seasonable measures by the use of her whistle or otherwise, to pass the tug Narragansett and her tow in safety, and in not seasonably indicating her intention of porting her wheel and passing to the westward of the Narragansett.

5. In other respects to be shown upon the trial.

The following witnesses were examined in Court:

On Behalf of the Libellant.

Edward G. Clarke, Master of the tug "Narragansett."

Michael J. Coleman, Master of the tug "Tice," coming up parallel with the "Narragansett" on her starboard-quarter.

Edward Knott, Master of the tug "Brinton," which passed on a northwesterly course between "La Bretagne" and the "Narragansett," as they were approaching.

John B. Roberts, Master of the tug "Independent," which, at the time of the collision, was astern of "La Bretagne."

Charles Gallagher, Captain of tug "N. Y. C. No. 10," who was coming out of Erie Basin.

Charles A. Day, Master of the tug "Charles Runyon," which was coming up the Bay astern of the tug "Tice" and on the port quarter of the latter.

Thomas B. Mullen, Floatman of the "Narragansett," on board carfloat No. 160, prior to the collision.

Harry Morris, mechanical draughtsman, who established the precise dimensions of the "Narragansett" and her floats.

Five other persons, who included all except one of those who were on board the "Narragansett" and her two carfloats at the time of the collision, were produced in Court on behalf of the libellant. In lieu of examining them, it was stipulated that the substance of their testimony would agree with the testimony of the witnesses already examined. (Rec., p. 49, fol. 195.)

One member of the crew of the "Narragansett" was not produced in Court, nor was his name or his station on the tug given, nor was any satisfactory explanation given for the failure to call him.

It is noticeable that no witnesses were called by the libellant from the barge "Moonbeam," from the steamship "Rushington," or from any of the other vessels on the anchorage grounds, excepting from Captains of tugboats. As the "Bretagne" was not injured in the collision she proceeded to sea. The suggestion of the libellant's counsel as to the failure on the part of the "Bretagne" to call outside witnesses, is sufficiently answered by the fact that the "Bretagne" did not stop to find witnesses, but proceeded on her voyage.

On Behalf of the Claimant.

Michael Sullivan, pilot of "La Bretagne."
Eugene Poncelet, Captain of "La Bretagne."

The following depositions, taken by the claimant in advance of the trial, were also offered in evidence:

Louis Roch, Third Lieutenant on "La Bretagne."

Yves Morise, helmsman.

Joseph Le Guillou, quartermaster, stationed on the bridge at steamer's engineroom speaking-tube.

Mathurin Le Louarn, seaman on steamer's bridge.

It was also stipulated that one Le Masne, Second Lieutenant on the steamer "La Bretagne," who was lookout forward near the bow, would, if called, testify in harmony with the testimony of Captain Poncelet. (Rec., p. 51, fol. 202.)

The District Court, in its opinion (p. 195, fol.

778) is in error in stating "there were numerous other witnesses from these outside vessels in Court, but the Advocate for the 'Bretagne' * * * stipulated that their testimony would agree with that already given."

Opinion, p. 195, fol. 778.

We desire to call the Court's attention to this statement of the District Judge as most obviously a mistake. All of the witnesses from outside vessels were examined. The only witnesses as to which the senior counsel for the "Bretagne" so stipulated were the Mate, the Oiler, the Fireman, the Floatman, and the steward of the "Narragansett," none of whom was in a position to know anything about the situation of the vessels or the facts of the collision. (Rec., p. 49, fol. 196.)

FIRST POINT.

The "Narragansett" was solely in fault for the collision because she was on the wrong side of the channel and in the path of outwardbound vessels.

The "Narragansett," at the time of the collision was, and, according to the testimony of her Captain (Clarke, p. 13, fol. 49), for some time previous to the collision had been, on the westerly side of the Channel and close to the edge of the anchorage grounds.

At the time of the collision he claims to have been about 200 feet away from the edge of the anchorage grounds.

Article 25 of the Pilot Rules provides that in narrow channels each vessel shall keep to that side of the Channel which is nearest to her own starboard hand.

The libellant on the trial was fully aware of its violation of Article 25, and of the effect that this violation would have upon its case, for it attempted to prove by Captain Clarke of the "Narragansett" a custom among river boatmen at certain stages of the tide, when towing heavy tows, to cross over to the westerly side of the Channel, to take advantage of the slack water.

Proof of a custom to violate a statutory rule can have no weight.

In the Alfred W. Booth, Judge Holt succinctly states the rule: "No custom can justify a violation of a United States Statute" (citing the Occidental Company v. Smith, 74 Fed., 261; 20 C. C. A., 419).

> The Alfred W. Booth, 127 Fed Rep., 454, at p. 455.

The "Narragansett," thus admitting its fault, and being found in fault, as it should be by the Court, for having been at the time of the collision in the act of violating the provisions of Article 25 of the Pilot Rules, must be held solely in fault unless she has satisfied the Court that her violation of the rule neither caused the collision *nor could have caused* the collision.

> The Delaware, 161 U. S., p. 459, at p. 469.
> The Brittania, 153 U. S., 130, at p. 143.
> The Martello, 153 U. S., p. 64, at p. 74.
> Belden v. Chase, 150 U. S., p. 674, at pp. 698, 699.
> The Acilia, 108 Fed., 975.

The Victory & Plymothian, 168 U. S., p. 410, at p. 427.
The Marguerite, 87 Fed., 953, at pp. 956-960.
The Livingstone, 87 Fed., 769, at p. 778.
The New York, 82 Fed., 818, at p. 829.
The H. F. Dimock, 77 Fed., 226, at p. 230.
Thames Rowboat Co. v. Central R. R. Co., 61 Fed. R., 117, at p. 118.
Flint & P. M. R. Co. v. Maritime Ins. Co., 71 Fed. R., 210, at p. 215.
"The Corinthian," Aspinwall Man. Cas., N. S. Vol. XI., Point 4, p. 264.

A study of the situation at and immediately previous to the collision would seem to indicate that the presence of the "Narragansett" on the wrong side of the Channel most certainly could, and did, cause the collision. The effect of her being there was to block the Channel, and crowd "La Bretagne" in the Channel. To the eastward of the "Narragansett" was the "Tice," further astern of both the "Tice" and the "Narragansett" was the "Charles Runyon" (Day, p. 45, fol. 179); to the westward of the "Narragansett" and the "Bretagne" were the anchorage grounds, where the "Bretagne" could not go since she drew 32 feet, and on the anchorage grounds was the barge "Moonbeam" and the tug "Brinton" and on or nearly over the line of the anchorage grounds was the steamship "Rushington" and several other barges.

The "Bretagne" was in a dangerous situation owing to but one cause, and that cause was the presence of the "Narragansett" where she had no right to be and where the "Bretagne" had a perfect right to go. Surely had the "Narragansett" been further out in the Channel, and had she been where she

claims the "Tice" was, there would have been plenty of room for the "Bretagne" to have passed both the "Tice" and the "Narragansett" in safety.

This fact taken in conjunction with her violation of Article 29, requiring her to carry a competent lookout (see *Second Point* of this brief), and her failure to answer the whistles of "La Bretagne" places the whole responsibility for this collision upon the "Narragansett."

SECOND POINT.

The "Narragansett" was solely in fault for the collision because of her failure to maintain a competent lookout.

The "Narragansett" and her tow, immediately previous to the collision, and at the time of the collision, were in the crowded waters of the Upper Harbor bound on a course for Pier 24, North River. On one of the floats there was stationed a float man named Mullen who, previous to the collision, was attending to other duties around the float than those of a lookout. There was no lookout stationed on top of the cars, and, at the time of the collision Mullen was not acting as such (Mullen, p. 50, fol. 199).

> "Q. Were you keeping a lookout forward? A. Well, I wasn't keeping a lookout, you know."

Captain Clarke, who was in charge of the "Narragansett" at the time of the collision, testified that it was the custom of the tugs and floats of the Bal-

timore & Ohio Railroad Company, to which the "Narragansett" belonged, in daylight and in clear weather to have no lookout on their boats until they reached Castle William (Clarke, pp. 127, 128, fols. 508-509). The collision occurred before the "Narragansett" had reached Castle William.

The argument advanced for the "Narragansett" that in obeying the custom of her owners not to carry a lookout, she was within the meaning of Article 29 providing for "the ordinary practice of seamen" is untenable.

Captain Clarke in his testimony further says that he did not sight the "Bretagne" until she was three or four lengths away, presumably meaning lengths of the "Bretagne," which would be between 1600 and 2000 feet (Clarke, p. 17, fol. 65).

The most he says about his vision and how much he could see on that day is that he could clearly see the horizon (Clarke, p. 12, fol. 47).

Nowhere in his testimony does he say that he had sighted the "Bretagne," or that having sighted her he watched her movements to see what her course was to be. He merely stated that he noticed "her coming down;" "we were abreast of Buoy 15, or below Buoy 15, and she was below Castle William" (Clarke, p. 16, fol. 62). He paid no attention to her signals because he thought they were for the tug "Tice," and evidently he was paying no attention whatever to any other vessels in the Channel.

Clarke also testified that "La Bretagne" was going at rate of 8 or 10 miles per hour. This means that if "Narragansett" had been standing still "La Bretagne" would have made 1600 feet, and reached her in slightly less than 2 minutes. But Clarke says the "Narragansett" was going 5 miles per hour. So that the collision if his testimony is correct ap-

pears to have resulted in about one and one-half minutes after he sighted "La Bretagne."

The District Court has found that this failure to maintain an active lookout did not contribute in any way to the collision.

We respectfully suggest that, in view of the fact that Captain Clarke did not see "La Bretagne" until she was within three or four lengths of him, although he was in very crowded waters all the time, and that no lookout was stationed either on the cars or on the float, charged with the duty of keeping a lookout, it must be apparent had a lookout been so stationed "La Bretagne" would have been seen in time at least for Clarke to have answered her signals, if not to have taken timely precaution to avoid it. This deliberate violation of a rule established by law for the protection of other vessels, a violation which is common among the boats owned by the libellant company, and which amounts to a custom among the Captains in charge of the boats of the libellant company (Clarke, pp. 127, 128, fols. 508-509), is and was most conclusive evidence of fault, and a conclusive reason why the "Narragansett" should be held to be in fault for the collision.

THIRD POINT.

The "Narragansett" should be held in fault for her failure to answer the signal from "La Bretagne."

It is not disputed that when the "Bretagne" first sighted the "Narragansett," when they were at a distance of about a mile from each other, that "La Bretagne" signalled the course she was about to proceed upon by blowing a single blast of the whistle and then turning to the starboard. The "Narragansett" did not reply to "La Bretagne's" whistle, but evidently ported her wheel and came a little to the starboard. (Sullivan, p. 55, fol. 217;

On perceiving this the Pilot of "La Bretagne" immediately gave another blast of the whistle, ported his helm and came again to the starboard. The "Narragansett" did not answer the second blast of the whistle but again sheered to the westward, practically across the bows of "La Bretagne." (Sullivan, p. 55, fol. 217.) "La Bretagne" then stopped her engines and reversed and blew the alarm signals. The "Narragansett" also stopped, reversed and blew her alarm signals, but the force of the ebb tide carried "La Bretagne" along and into the starboard side of Float No. 160-N.

Captain Clarke, of the "Narragansett," testified on the trial that he did not answer the signal from "La Bretagne" because he did not think the signal was for him.

The Captain of the "Narragansett" being on the wrong side of the Channel was in violation of Article 25 of the Pilot Rules; failing to have a

lookout he was in violation of Article 29; and it could hardly be expected, when he was asked why he failed to answer the signals of "La Bretagne," that he would admit this last as an intentional violation of Article 18. The only excuse he could offer was the one he did offer, that he *thought* "La Bretagne" was signalling to somebody else. Since he was in the wrong, however, in two other respects, and consequently carried the very heavy burden of explaining all of his actions on the morning of the collision, his testimony, when compared with the testimony of those on "La Bretagne," must be accepted under suspicion and examined with the greatest of care. "La Bretagne" very properly signalled her course and the "Narragansett," being in the act of blocking the Channel, and in the way of outwardbound ships, was bound, not only to avoid all other vessels having the right of way, but it was her duty to answer their signals to indicate that she understood them. Her failure to do so justified "La Bretagne" in the course it pursued, and was a cause of the collision for which the "Narragansett" should be held solely in fault.

The Dictator, 169 F., 789.

Her failure to hear the whistle of "La Bretagne" showed lack of vigilance by the lookout.

The Mauch Chunk, 154 F., 182, at p. 188.

Her failure to answer "La Bretagne's" signal contributed to the collision.

The Lowell M. Palmer, 58 Fed., 701, at p. 702.

It is no excuse to say he did not know the signal was for him.

The City of Chester, 78 Fed., 186, at p. 188.

FOURTH POINT.

The "Narragansett" was solely in fault for the collision.

We think that a careful examination of the testimony in the case, taken in conjunction with the known situation on the morning of the collision, and the probabilities to be drawn from the respective situations in which the vessels found themselves, will establish satisfactorily that the navigation of the "Bretagne" was in every sense correct, and the case made out by the witnesses for the "Bretagne" is consistent with all the probabilities.

The morning of the collision was bright and clear. The collision occurred at 10:40 o'clock in the morning. The "Bretagne," a Transatlantic steamship, was bound out to sea on one of her regular crossings, in charge of a duly licensed Pilot, and Captain Poncelet, an officer of the French Navy, and a navigator of many years' experience. She had left her dock on the morning of the collision about forty minutes prior to the collision. At the time of, and immediately previous, to the collision, her course was in accordance with the Pilot Rules, down the main ship Channel on the westerly side. She had a lookout on duty at the time, besides other officers at the siren, the telegraph, and the wheel. She had been compelled to

stop and go slow at various times in coming down the River and, according to the testimony of the Pilot and her Captain, which is not disputed, on leaving the mouth of the North River at the Battery had straightened out on her Channel course southwestsouth. There were in the vicinity a large number of tugs, barges, ferryboats and other river craft. According to the testimony of one of the libellant's witnesses, about this time the tug "Brinton" crossed her course, and the tug "Overbrook" had just been passed by her. Ahead of her was the tug "Tice," the tug "Charles Runyon" and the tug "Narragansett," all proceeding up the main ship Channel and on the westerly side of the main ship Channel. To her starboard were the anchorage grounds into which she could not go—first, because the water was not of sufficient depth, and second, because there were various vessels in the anchorage grounds, among those named being the barge "Moonbeam," about 150 feet from the anchorage grounds, and the steamship "Rushington," lying across the edge of the anchorage grounds, and the tug "Brinton" further in on the anchorage grounds, seeking her anchorage buoy.

This was the position in which the "Bretagne" was when she first sighted the "Narragansett," and up to this point in the testimony there is no dispute between the witnesses for the libellant and the claimant. The "Bretagne" at this time was about opposite Ellis Island and the "Narragansett," which was the nearest of the tugs with their convoys, was opposite Buoy No. 15, about one mile distant.

The "Bretagne" blew one blast of her whistle, signalling that she would go to starboard. Her helm was ported and she went to the starboard about three degrees. Her engines were then slowed.

The "Narragansett" did not answer the signal and, perceiving this, the "Bretagne" blew a second blast of her whistle and went a little further to the starboard. The fact that the "Bretagne" blew a blast of the whistle when abreast of Ellis Island is not contradicted. The fact that she blew a second blast of the whistle is admitted by all parties, the only question in the case being as to the relative positions of the vessels when this second blast of the whistle was blown. It is admitted that the "Narragansett" did not answer this blast of the whistle because her Pilot did not think that the "Bretagne" was signalling to the "Narragansett."

The failure to hear the first whistle of "La Bretagne" showed lack of vigilance on the part of her lookout, which was in itself a fault.

The Mauch Chunk, 154 F., 182, at p. 188.

Her failure to answer the second whistle was an additional fault.

The Lowell M. Palmer, 58 F., 701, at p. 702.

And it is no excuse for the "Narragansett" to say that her Captain did not know the signal was for him.

The City of Chester, 78 F., 186, at p. 188.

As he was in a wrong part of the Channel and without a lookout as required by the Rules, his duty was to exercise the utmost caution to avoid any possibility of danger.

The failure of the "Narragansett" to signal her

course was a further fault contributing to the collision.

In the case of "The Corinthian" (Aspinwall's Mar. L. Cas., New Series, Vol. XI., Part IV. p. 264), held, "that the failure of a vessel to signal her course was a fault contributing to the collision, for which she must be held responsible."

It is here that we find a wide divergence in the testimony of the witnesses for the respective parties.

The Captain of the "Narragansett" testifies that at this time he was proceeding along the westerly edge of the anchorage grounds on a course northeast by north; that he first saw the "Bretagne" when she was about three or four lengths away, a little below the Fort on Governor's Island, and she was coming down to the southward. This is the only course of the "Bretagne" as given by the "Narragansett," the exact course given by Pilot Sullivan and Captain Poncelet for the "Bretagne" is southwestsouth. Captains of tugs in the vicinity testified, in support of the testimony of Captain Clarke of the "Narragansett," that the two vessels at that time were starboard to starboard. According to the libellant's testimony, therefore, we have this situation:

The "Narragansett" was along the westerly edge of the anchorage grounds about opposite Oyster Island Buoy No. 15, proceeding on a course N. E. by N. The "Bretagne" was a little below Governor's Island, or about opposite the Fort on the Island, and two and one-half points to the eastward of the "Narragansett." Captain Clarke states the distance between the two vessels when he first took notice of the "Bretagne" as from three to four lengths, which would be between 1600 and 2000 feet. The "Bretagne" then sheered

to the starboard, changing her course by about four or five points and striking the starboard float of the "Narragansett's" convoy about one hundred feet abaft the bow. The collision occurred just off Liberty Island.

Taking the situation, therefore, as described by the witnesses for the "Narragansett," it requires but little calculation to show that if the "Bretagne" sheered four or five points she practically sheered round so as to be pointing her bow at Liberty Island and must have been lying practically across the Channel at the moment she struck the "Narragansett." This is hardly conceivable. The story as thus outlined by the witnesses is improbable. The Court will hardly believe that a licensed Pilot and an experienced navigator, in charge of a large ocean steamship, would take the enormous risk to their vessel and the lives of their passengers which such a situation would make it seem they had taken. The "Bretagne" does not dispute that she did sheer to the starboard, but it was only a slight change in her course calculated to carry her between the anchorage grounds and the "Narragansett." No sane navigator would take a vessel of her size into the anchorage grounds, not only by reason of the shallow water, but also by reason of the risk of collision with the vessels at anchor there. If the courses of the vessels as outlined by the "Narragansett's" witnesses should be charted, the Court will find that if the "Narragansett' was near the westerly edge of the Channel and had the "Bretagne" two and a half points on her starboard bow, that the "Bretagne" would be well below Fort William and close to the easterly edge of the Channel. This is inconceivable. Oh, if she is placed in the center of the Channel, as Captain Clarke insists she was, when she was about at Fort William,

or a little below it, and sheered four points, the Court will find, as mentioned above, her nose would then be pointed directly at the Statue of Liberty, and well into the anchorage grounds.

It will not do to say, as does the District Court in its opinion, that the witnesses are mistaken in their courses, or in the distances they give concerning the relative positions of the vessels, because, if their testimony is erroneous, it will hardly do to base a decision, finding the "Bretagne" in fault, upon such erroneous testimony. Either Captain Clarke and his witnesses told the truth or they have not told the truth. It was physically impossible for the "Bretagne" to have manoeuvred as the witnesses for the "Narragansett" state, and it is impossible of belief that she was at the time over on the easterly side of the Channel.

The Court will bear in mind that the "Narragansett" is a vessel which was admittedly at fault to begin with for being in a place where she had no right to be. She was also admittedly in fault for failing to carry a lookout, and admittedly she was in fault for the failure of her Captain to answer the signals from the "Bretagne." His testimony is that of a man seeking to excuse himself from the consequences of his own wrongful act, is subject to suspicion, and unless clearly truthful and born out by the physical facts, it should be disregarded and the case decided against him. We repeat that the courses of the vessels could not be laid out as described by the witnesses for the "Narragansett." It is true they read well and make out a fair case against the "Bretagne," but they cannot be reduced to actual courses and made to hang together.

The testimony from the "Bretagne" is far more

consistent with the physical aspect on the morning of the collision.

The "Bretagne" was proceeding on the westerly side of the Channel going out to sea and was four or five hundred feet easterly from the westerly edge of the Channel. The situation toward other vessels in the vicinity has already been described, excepting the courses which they were following. The only course which it is necessary to give exactly, for the purposes of this argument, is that of the "Narragansett."

The "Narragansett" was coming up the Channel, also on the westerly side of the main ship Channel, and, according to the testimony of the witnesses from the "Bretagne," was pursuing a course N. N. E. She bore on the bow of the "Bretagne" about a half a point, or a point. The "Bretagne's" course at that time was the course of the Channel southwestsouth. The course of the "Narragansett" at this time, if persisted in, would carry her eventually across the bow of "La Bretagne." The starboard float of the "Narragansett" projected forward of the bow of the "Narragansett" at least 150 feet, while the float on her port side projected forward from her bow about 80 or 85 feet. It is very easy to see that the "Narragansett" following the course N. N. E. converging towards the course of the "Bretagne" presented to the "Bretagne" the starboard side of the starboard float. This would put the vessels in the position of being end on, or nearly end on, within the meaning of Article 18, Rule 1. Even had the "Narragansett" been slightly to the starboard of the "Bretagne" so as to be a point, or half a point, on her starboard hand, she would still be within the meaning of the rule and of the decisions of this

Court, end on, or nearly so, and, therefore, bound by Article 18, Rule 1.

The Islander, 152 F., 385, at p. 387.

At this juncture the "Bretagne" blew a blast of her whistle and went to starboard, and the engines were slowed. The "Narragansett" did not answer this blast of the whistle, but straightened up to the eastward. She then set over toward the westward and a moment later a second blast of the whistle was blown; the "Narragansett" straightened up to the eastward but did not answer the signals, and the engines of the "Bretagne" were stopped and reversed. At the time the vessels came together the "Bretagne" was moving with the tide about two or three knots an hour, and the "Narragansett" was under some little headway. The blow struck by the "Bretagne" was very light, as may be seen from the fact that she is a sharp-nosed steamer of 11,000 tons and she only cut into the "Narragansett" for a distance of about ten feet. The "Narragansett" did not sink.

If the courses of the two vessels thus stated by the witnesses for the "Bretagne" shall be laid out, the Court will perceive that the testimony of the witnesses of the "Bretagne" is not only correct, but that the situation when reduced from mere words into the actual courses of the vessel is a practicable situation. This would give the "Bretagne" ample room to pass between the "Narragansett" and the edge of the anchorage grounds had the "Narragansett" answered the whistle of the "Bretagne" and straightened up to her starboard hand and passed port to port. The change of course of the "Bretagne" altogether amounts to but a point, or a point and a half, at the extreme.

Even in this situation the "Bretagne" could not have altered her course four or five points, as testified by the witnesses for the libellant, without carrying herself well over into the anchorage grounds.

The testimony from the "Bretagne" is consistent throughout. It is true the witnesses differ as to some very minor matters, but in the essential facts the witnesses are all agreed.

All the testimony for the "Bretagne," with the exception of the testimony of Captain Poncelet and Pilot Sullivan, was taken months before the trial; while the testimony from the "Narragansett" was taken in the courtroom. The testimony of the witnesses, other than those who were on the "Narragansett," is very weak indeed. Captain Knott of the "Overbrook" attempted to testify as to the respective positions of the two vessels, but his testimony is of no aid to the Court in this particular—first, because his observation of the courses followed by the two vessels was made while he was going between them, crossing their respective courses, and second, at a time when they were more than a mile apart, and third, because he saw but little "until after they struck" (Knott, p. 30, fol. 119). He was then going into the anchorage grounds to his stake boat. His testimony as to their respective positions some time before the collision is worthless. He further gives evidence which shows that his own testimony is of no effect, for he said that his attention was called to the vessels by a deckhand on his boat (who was not produced on the trial) "and he said there was going to be a collision and then I turned and looked. I saw the steamer in collision with the car float." (Knott, p. 34, fol. 134.) This sort of testimony will hardly help the libellant's case.

Captain Roberts, of the tug "Independent," a witness for the libellant, testified that he was bound from Jersey City to 42nd Street, South Brooklyn, and that he passed "La Bretagne" off the anchorage buoy (presumably the upper anchorage buoy) and that she was then on his port hand. He knows nothing further about the situation of the vessels because he "noticed both of them after the alarm signals were blown; that was what attracted my attention to them." (Roberts, p. 37, fol. 146.) He then observed that the "Narragansett" was to the westward of the French liner. (Roberts, p. 37, fol. 148.)

At the time of the alarm whistle he noticed the "Bretagne" had a *slight* sheer to starboard. When led up to it by counsel he then states the sheer to have been three or four points, although he had previously testified that he passed her at the Jersey Flats off the upper anchorage buoy. If "Bretagne" was so close to the westerly side of the Channel, such a sheer would be impossible. (Roberts, p. 38, fol. 149.) Counsel for the "Narragansett" by his leading questions, in which he persisted during the entire trial, endeavored to have this witness say that he was watching the French liner from the time he passed her stern up to the time of the collision. The witness refused to give any such answer, but instead, stated that "from the time of the signals I was looking at them. Yes, sir." (Roberts, p. 38, fol. 151.) This means since the alarm whistle; and then counsel asked the observant witness what was the "Narragansett" doing during this time, and he answered: "I couldn't say what she was doing. I heard her whistle, that was all." (Roberts, p. 38, fol. 152.)

When asked if "La Bretagne" could have seen the red light of the "Narragansett," he said, "I don't think so" (p. 49, fol. 193).

The witness has already testified that after his attention was attracted by the alarm signal he saw

the "steamer heading towards—when they first blowed the alarm signal I could see the 'Narragansett' to the westward of the steamer." (Roberts, p. 37, fol. 148.) And then later, when asked what the "Narragansett" was doing, and whether she had changed her course or not, he answered: "I couldn't say what she was doing; I heard her whistle; that was all. She was obstructed, and then I was astern of the steamer." "Q. That is, the liner was between you and the 'Narragansett' and you could not see? A. That is right." (Roberts, p. 38, fol. 152.)

The witness was obviously contradicting himself constantly, as has just been pointed out, and one portion of his testimony cannot, by any means, be reconciled with the other.

When asked as to whether he thought the action of the "Bretagne" was a safe action to take, he answered: "No, sir, because there wasn't room enough between the 'Narragansett' and the vessels anchored on the Jersey Flats." (Roberts, p. 37, fol. 145.) This testimony would seem to be of little benefit to the libellant, because if anything, when taken in conjunction with the same witness' statement that when he first saw "La Bretagne," she passed him "off the upper anchorage buoy on the Jersey Flats" (Roberts, p. 37, fol. 145), and the testimony of libellant's witness Knott that the "Bretagne" was "as near as I can judge she was pretty close to the Flats" (Knott, p. 35, fol. 138), it would appear that the "Bretagne" was, as Captain Poncelet and Pilot Sullivan, and the four Quartermasters testified, close to the westerly side of the Channel. The testimony of these two witnesses, although palpably intended to be in favor of the libellant, only confirms the truth of the testimony of the witnesses from the "Bretagne."

Captain Gallagher, of the New York Central Tug No. 10, was just coming out of Erie Basin about three and a half miles away. He had unusually good vision, for he could see from that distance (it will be remembered he was running at right angles to both vessels) the change of course on the part of the steamer, and that the change amounted to four or five points. He heard no whistles until the alarm whistles, but from where he was, over in Erie Basin, just coming out of the gap (Gallagher, p. 45, fol. 171), he was able to tell that the "Narragansett" blew her alarm signals first. (Gallagher, p. 44, fol. 173.) He also testifies, "I heard the signal of the 'Narragansett' first and then that attracted my attention." (Gallagher, p. 44, fol. 175.)

Captain Day, of the tug "Runyon," a witness for the libellant, was coming up the Bay with two scows at the time of the collision. He was astern of the "Tice," which was astern of the "Narragansett." He had been passed by the "Tice" in coming up the Harbor. The "Narragansett" had passed the "Tice" coming up the Harbor. Neither Captain Coleman, of the "Tice," nor Clarke, of the "Narragansett," refer to having passed Captain Day, or to the location of his tug. His testimony is sufficiently characterized by the following quotation, made in describing "La Bretagne's" sheer to starboard.

"I could not tell just how many points, but she was almost at right angles across the Channel when they were coming together.

Q. The French Liner was at right angles with the Channel? A. Yes." (Day, p. 46, fol. 184.)

The District Court said of this witness that he "rather exaggerated her sheer." (Opinion, p. 195, fol. 778.)

Captain Coleman of the "Tice" testified that he was on a parallel course with the "Narragansett," though astern of her, and that when he first saw "La Bretagne" she was broad starboard to starboard with the "Narragansett" and head and head with his vessel and she sheered to the starboard directly at the "Narragansett." He heard the whistle from the "Bretagne" and saw her sheer, but assumed she was signalling to him. Before the "Narragansett" blew her alarm signal the "Bretagne" had made at least two lengths. (Coleman, p. 29, fol. 113.)

The testimony of Captain Coleman, of the "Tice," does not by any means jibe with the testimony of Captain Clarke, of the "Narragansett;" nor can his testimony be reconciled with the probabilities.

He says, in substance, that he was coming up the Channel and had been passed by the "Narragansett" between Robbin's Reef and Oyster Island. She passed him on his port side. He took notice of the French liner coming out of the mouth of the North River and blew a signal to the French liner. (Coleman, p. 27, fol. 108.) He blew one whistle, which was answered by the French liner, and at this time he was head and head with the French liner. A few seconds after he got an answer and "she kept coming for me for a few seconds and then sheered to starboard." He states that she proceeded one length, started to sheer and kept on going to starboard until there was about to be a collision, and then he heard Captain Clarke sound danger signals. (Coleman, pp. 28-29, fols. 112-113.) While she was backing, the French liner kept going to starboard. Before the "Narragansett" blew her alarm signals

the French liner had made a couple of lengths. (Coleman, p. 29, fol. 114.)

The Captain of the "Narragansett" testifies that the "Bretagne" was below Castle William when she blew this one blast of her whistle and she started to sheer then, and at the time of blowing that blast of the whistle she was but three or four lengths away. Coleman says he blew to her when she was coming out of the North River and she made a length before she started to sheer; she then made two lengths further before the "Narragansett" blew her alarm whistles and they then came together immediately. It is by actual measurement a good mile and a half from the mouth of the North River to the place where the collision occurred and yet, if Captain Coleman's testimony is to be believed, the "Bretagne" made at the most three lengths, or 1600 feet, before the collision occurred, and after he first signalled her. This means that "La Bretagne" in a distance of 1600 feet ran sideways 1000 feet. The proposition is ridiculous. The statement that "La Bretagne" sheered to starboard on coming out of the North River is a consistent one. Coming down the River about in the centre, in order to follow the Channel course, she must necessarily have turned to the starboard. Any sheer made at this time was a proper manoeuvre.

It is all very well for the District Court to base its finding of faulty navigation on the part of the "Bretagne" on the testimony of outside witnesses, which we have just discussed, and to excuse their inaccuracy, at the same time sustaining the bulk of their testimony, but we believe we have shown conclusively that not a single one of the outside witnesses for the "Narragansett" has testified about a single fact which places the responsibility upon the "Bretagne," or that their testimony, under the circumstances, is shown to be worthy of belief.

The Court will observe that the senior counsel for the "Bretagne" did not cross-examine these witnesses from the various tugs in the vicinity to any great extent, but allowed the improbability of their stories, when taken in conjunction with the proveable facts, to speak against themselves and against the weight of their testimony. The testimony of these various witnesses is so improbable and so ridiculous that it hardly deserves serious treatment.

FIFTH POINT.

The preponderance of evidence establishes the claim of "La Bretagne."

In the case at bar the libelant called nine witnesses and the claimant called eight witnesses. One of the witnesses for the libelant, Harry Morris, was merely called to give evidence as to the dimensions of the tug and floats. From the crew of the "Narragansett" there were two witnesses called, Edward G. Clarke, Master, and Thomas B. Mullen, floatman. Mullen did not testify as to any of the facts of the collision. Five masters of tugs and floats in the vicinity were called for the libelant. For the "Bretagne" six witnesses who were actually on board the ship and on the bridge at the time of the collision were called to testify to substantially the same facts.

An examination of the libel in this case shows that at the time of the commencement of this action the libelant claimed that immediately before the collision the "Bretagne" bore "slightly on the starboard

bow of the "Narragansett," (Libel, p. 3, fol. 9). On the trial the Master of the "Narragansett" testified that the vessels were broad starboard to starboard, being between 700 and 1,000 feet apart.

As to the distance the vessels were apart, as to the courses which they were sailing at the time, and as to such changes of courses as were made immediately before and at the time of the collision, the testimony of the men on board of the vessel is necessarily more accurate and to be given more weight than the testimony of outsiders who were in various positions not calculated to enable them to testify accurately.

So that in this case we have the testimony of six men from the bridge of the "Bretagne" against the testimony of one man from the wheel-house of the "Narragansett."

We will briefly refer to the testimony of what the District Court has called the "disinterested" witness for the "Narragansett."

Captain Coleman of the tug "Tice" was 1,000 feet to the eastward of the "Narragansett," at least a quarter of a mile astern, and when he first sighted the "Bretagne" and signalled to her he was a mile and a half away.

Captain Knott of the Tug "Brinton" had his opportunity to see the relative courses of the vessels and how they bore towards each other while running between them, crossing their respective courses while they were a mile or more apart.

Captain Roberts of the tug "Independent" had been passed by the "Bretagne" and was 1,200 feet astern of the "Bretagne" when he heard the alarm whistles blown, and testified he could not see the movements of the "Narragansett," because the "Bretagne" was between him and the "Narragansett."

Captain Gallagher of the Tug "N. Y. C. No. 10" was coming out of the gap at Erie Basin, about three miles away, and running on a course at right angles to the two vessels.

Captain Day of the Tug "Charles Runyon" was about a quarter of a mile astern of the "Tice" and the "Tice" was a quarter of a mile astern of the "Narragansett."

The testimony of these witnesses has been relied upon by the District Court to decide against the "Bretagne," notwithstanding the fact that the testimony from the "Bretagne" is clear, concise, definite and positive. The testimony from the "Bretagne" is that after coming down the River she swung under her port wheel to the starboard, coming out of the mouth of the River, or at the upper anchorage buoy, so as to proceed on a course along the westerly edge of the Channel and in the Channel. Captain Coleman of the "Tice" verifies this, for he says that he saw the "Bretagne" when she was coming out of the mouth of the River; that he blew to her and that she then swung to the starboard. Captain Knott of the Tug "Brinton" verified this, for he testified that the "Bretagne" was on the right hand side of the Channel, pretty close to the Flats (Knott, p. 35, fol. 138). Captain Roberts of the Tug "Independent" also verifies this, for he says that the "Bretagne" passed him on his port hand off the upper anchorage buoy on the Jersey Flats (Roberts, p. 37, fol. 145). He was going in a southerly direction and slowed to let "La Bretagne" cross his bows. As she was then swinging, according to the testimony of her own witnesses, under her port wheel, it is not surprising that thereafter he did not see the "Narragansett," his vision being obstructed by the "Bretagne" (Roberts, p. 38, fol. 152).

Captain Day of the Tug "Charles Runyon" verifies the testimony of the witnesses for the claimant, for when asked as to the course of the "Bretagne" he says she was headed a little to the southward (Day, p. 46, fol. 182). This verifies the testimony of both Captain Poncelet and Pilot Sullivan (Poncelet, p. 87, fol. 345; Sullivan, p. 53, fol. 209).

Captain Roberts, when asked if the "Bretagne" violated any of the rules of navigation, answered emphatically, "No" (Roberts, p. 41, fol. 161).

The testimony from the "Bretagne" is quite distinct that, on leaving the mouth of the North River, she swung under her port wheel to the starboard, so as to follow the course of the Channel, and that at that time she blew a blast of her whistle to signify the course she was going to pursue. This was a correct and proper thing for her to do, and at that time she had a perfect right to declare her course in that part of the Channel and to pursue it.

No witness called for the libelant denies this statement of the witnesses for the "Bretagne," and the same must stand uncontradicted and as true. That she then proceeded a little way, when noticing that the "Narragansett" was setting over again to the westward, she blew a second blast of the whistle and went a little further to the westward, slowed her engines, then stopped and backed, but that the tide carried her into the "Narragansett" (Poncelet, pp. 87, 88, fol. 345 *et seq.;* Sullivan, p. 55, fol. 217; Le Louarn, pp. 173, 174, fols. 692, 693; Morice, p. 150, fol. 599; Le Guillou, p. 164, fol. 654; Roch, p. 134, fol. 535).

Captain Poncelet's report (Exhibit E, pp. 184-5 *et seq*), made to the French authorities under the rules for postal steamers, and before he had returned to this country and consulted counsel, bears

out the contention of the claimant's witnesses. (See p. 185.)

The report made to the Pilot Commissioners supports the contention of the claimant (Pilot's Report, p. 184).

On the whole case, therefore, it is respectfully submitted that the weight of evidence in the case clearly supports the contention of "La Bretagne" and that the decree of the District Court, holding "La Bretagne" in fault for her navigation, should be reversed.

SIXTH POINT.

The District Court did not err in holding that the Main Ship Channel of the Upper Harbor of New York is a narrow Channel, and that the "Narragansett" was at fault for the collision herein for manoeuvring on the wrong, or westerly, side of such narrow Channel.

The District Judge in his opinion has held that the narrow Channel rule applies to the main ship Channel of the Upper Harbor of New York, and, apparently, has rested his decision upon the decision in "The Bee" (138 Fed. Rep., 303).

At the outset we desire to call the Court's attention to a very apparent mistake in the brief of counsel for the libellant on page 7. Counsel alleges in his brief that it was not pleaded by the "Bretagne" that the main ship Channel was a narrow Channel, and that the proofs on the trial were not directed to that issue.

The answer of the "Bretagne alleges distinctly in two places (allegations "Third" and "Fourth," pp. 8-9, fols. 32-33), that the "Narragansett" crowded the "Bretagne" in the Channel. Counsel for the "Narragansett," at the very opening of his own case, assumed that he must overcome the narrow Channel rule in order to excuse his vessel from liability, for he attempted to prove by the Captain of the "Narragansett" a custom to violate the rule and proceed along the westerly side of the Channel. Surely counsel must have had the narrow Channel rule in mind when he attempted to prove an excuse to violate it, otherwise there was no occasion for his attempt, or his insistence upon proving it in the face of the decision of the Court.

We have examined with care the brief submitted by the counsel for the libellant and the learned argument advanced by him for the purpose of establishing his contention that the main ship Channel is not a narrow channel, but a careful examination of the cases cited by him in support of his argument, as well as the other cases hereinafter referred to, satisfies us that the main ship Channel is a narrow channel within the meaning of Article 25.

It is true there is no decision reported, so far as we are aware, which holds the main ship Channel to be a narrow channel, but the trend of the decisions of this Court, in respect to channels within the jurisdiction of this Court, and of the other Circuit Courts of Appeal with respect to channels within their jurisdiction, would seem to establish conclusively that the main ship Channel of the Upper Harbor of New York comes within the provisions of Article 25.

> "Article 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

This article is the same in the inland rules as in the international rules.

One of counsel's contentions is that Article 25 does not apply to inner waters of harbors. If this contention is correct, then why was there the need for the establishment of Article 25 in the Inland Rules? There must be no other reason except that it was intended to apply to rivers, lakes and the upper or inner harbors of the entrances to large ports.

Of course, no set rule has been laid down as to just what is a narrow channel, but, in order to determine what waters shall be so termed, it is necessary to consider their location, their depth, their width and the purposes for which they are designated.

It is also necessary to consider what was the reason for establishing a narrow channel rule, and for the convenience and safety of what class of vessels it was designed.

If we take the width of a Channel as the test of what is a narrow channel, then the main ship Channel of Upper New York Harbor comes well within the decisions applying the narrow channel rule.

The District Court, in his opinion, at p. 196, fols. 784, states that the Channel here was about 4,500 feet wide.

We respectfully suggest that the District Court is entirely in error in this connection and that a measurement of the channel at the point where the collision occurred will disclose the fact that it is

nearer 2,500 feet than 4,500 feet wide, and is, in fact, at no place more than 3,000 feet wide.

In the Alfred W. Booth (127 Fed. Rep., p. 453 at pp. 454-5), Judge Holt has industriously collected the decisions applying the narrow channel rule and then applied the narrow channel rule to the Bay Ridge Channel in the Upper Harbor, which he states to be about half a mile wide.

This Court had previously applied the narrow channel rule to the Lower Bay where the Main Ship Channel is at least 2,000 feet wide.

"The Sea King," 114 Fed. Rep., 535.

This Court has also applied the narrow channel rule to the Hudson River from Yonkers to the City Line.

"The Emma J. Rose," 145 Fed. Rep., 13.

In "The Bee," (138 Fed. Rep., 303), this Court approving the decision in "The Sea King," *supra*, says:

By inferences from the decision of this Court in "The Sea King," *supra*, in "The Bee" (138 Fed. Rep., 303); and the "C. W. Morse" (161 Fed. Rep., 847), it would seem that this Court, while not passing upon the question, has given indication sufficient to show that the Main Ship Channel is a narrow channel and subject to the rule.

In "The Sea King" (114 Fed. Rep., 535), the Court says:

> "Inextricable confusion would result if under Rule 25 an incoming vessel in the Main Ship Channel were to be justified in keeping close to his red buoys, and at the same time were to be held in fault because she did not

> keep hundreds of feet further east on the starboard side of the middle line of the entire body of water."

The Court further said that it was sufficient to hold upon that appeal that in the case of a bay which was also a port or harbor, that the entire body of navigable water is not to be considered a narrow channel where in such bay had been designated, a number of channels lying substantially parellel and in the same general direction as the flow of the tide, or current.

> "The Bee," 138 Fed. Rep., 303.
> "The Sea King," 114 Fed. Rep., p. 535.

Counsel for the libellant in his brief, at page 8, states that he has been unable to find a case that holds that where a stretch of water deep enough for ordinary commerce extends in one direction for a considerable distance as compared with the breadth of the water has of itself been treated so as to constitute it a narrow channel.

This Court has already held to that very effect in "The Sea King," *supra*, and "The Bee," *supra*.

We admit that the term "narrow channel" is not one that may be applied rigidly to any body of water, according to its dimensions or depth, but that it is governed in a measure by the needs of particular navigation.

The Upper Bay in New York Harbor extends from the New Jersey shore to the Long Island shore, and is, in some places, six miles wide. To hold this to be a narrow channel would be rather a stretch of the imagination, and, as counsel for the libellant in his brief is trying to insist that this Court must declare the entire Upper Bay of New York Harbor to be a narrow channel, if the narrow

channel rule is to be applied in this case at all, his assumption is entirely erroneous. Counsel has evidently overlooked the fact that while almost the entire width of the Upper Bay was navigable to the vessel he represented, and to her tows, there was only 2,500 to 3,000 feet navigable for the "Bretagne." The Government had restricted the area in which the "Bretagne" might navigate, while, in a measure, it had not restricted the area in which the "Narragansett" might navigate.

The Main Ship Channel is primarily intended only for vessels of deep draft, and to fail to apply the narrow channel rule to that stretch of water would be to kill the effect of designating it as a channel for deep-draft vessels. The narrow channel rule has been invariably applied to harbors. We do not cite the numerous cases in which it has been applied to sections of rivers, many of which cases have been cited by Judge Holt in the "Alfred W. Booth."

It has been applied to harbors in the following cases:

Cardiff Drain ("The Leverington," 11 Prob. Div., 117);

The President Roads in Boston Harbor ("The Yarmouth," 100 Fed., 667);

Entrance to the Port of Baltimore ("The Acilia," 108 Fed. Rep., 975);

The Lower Bay of New York', 2,000 feet wide, ("The Sea King," 114 Fed. Rep., 535);

The Upper Bay of New York, Bay Ridge Channel, 2,600 feet wide, ("The Bee," 138 Fed. Rep., 303);

The Golden Gate of San Francisco Har-

bor, 7/8 of a mile wide, (Occidental Co. vs. Smith, 74 Fed. Rep., 261);
The Straits of Messina, 11 miles wide and 2 miles wide at its narrowest point, ("The Rhonda," 8 App. Cas., 549).
See also the "C. W. Morse," 161 Fed. Rep., 847, at p. 850.

Counsel for libellant has attempted to point out that the courts will not apply this rule to inner harbors. And he has attempted to draw a distinction between the Upper Harbor of New York and the Golden Gate at San Francisco, and the Harbor of Boston.

His main argument seeming to be that if it is possible, or at all necessary for tugs, or light-draft vessels, to cross such a channel, that, therefore, the channel cannot be considered a narrow channel.

An examination of the chart, we think, will sufficiently show that the Upper Harbor of the entrance to Boston above the President Roads, is an entirely different one from that of Upper New York Harbor. The President Roads has already been held to be a narrow channel. ("The Yarmouth," 100 Fed., 667.) Above the President Roads, which was the portion of the harbor before the Court in the "Calvin Austin," there was no broad bay with a defined fairway, or channel, on the sides of which fairway or mid-channel, other vessels could navigate, while in the Upper New York Bay there was a fairway, or mid-channel, and it was in that fairway, or mid-channel, that the collision occurred. That it was upon this reasoning that the Court in the "Calvin Austin" decided that case, is quite apparent from the decision.

"The depth of water from the docks on the north side to those on the south side, and from

> those on the west to the place of collision, nearly out to the Gas Buoy, is practically uniform. There is no fairway, or mid-channel, in this inner harbor to which the words of the rule could apply, or by which ships sailing in could be guided. (The "Calvin Austin," 9 Exchr. C. R., 160-181; Can. Supr., 616-622.)

Counsel has assumed, in attempting to apply the decision in the "Calvin Austin" to the case at bar, to call the Court's attention to certain channels, etc., in the Upper Bay of New York which are part of the Upper Bay now, but which were not at the time of the collision in suit in 1904.

The Pennsylvania Railroad Terminal, and the channel leading to it, were not in existence in March, 1904. Black Tom Channel was not of the depth shown upon the chart of the Upper Bay in 1904, although it appears now. Governor's Island has since been partly filled in and is being filled in daily. The Red Hook Piers in New York Harbor are some three miles away from the channel under discussion.

It will be further noticed by the Court that the channel where the collision occurred in the case of the "Calvin Austin" is practically the same as the channel of the North River between the Battery and 23rd Street, which this Court held in the "Islander" (152 Fed. Rep., 385), was not a narrow channel, as it is lined on either side by docks in close proximity to the channel.

On page 12 of his brief counsel states that the waters of the Golden Gate, forming the approach of San Francisco Harbor, must be almost entirely used by other traffic on parallel lines and cites the Occidental Company vs. Smith (74 Fed. Rep., 261). To one familiar with the Golden Gate, or to one who will examine the Government chart of the

Golden Gate, the error in this statement is manifest.

The Golden Gate lies along the main shore of the City of San Francisco and vessels are constantly crossing that going to Sausalito, Angel Island, Richardson Bay and other places on the opposite shore. It is almost identical with the situation of the main ship Channel, which divides a portion of New Jersey from a portion of New York.

We submit that it appears, not only from the decisions of this Court, but the decisions of Circuit Court of Appeals in other Circuits, in the decisions of cases involving the same questions, that the narrow channel rule must be applied to the main ship Channel in the Upper Harbor of New York Bay.

SEVENTH POINT.

Some suggestions prompted by the brief submitted by the libellant.

Counsel for libellant refers to the statements made by Captain Knott (p. 34, fol. 136) and Captain Clarke (pp. 21-22, fols. 84-85), referring to the bad trim of the "Bretagne." Neither of these witnesses so stated, but only stated that the "Bretagne" "seemed to be by the head." (Knott, p. 34, fol. 136; Clarke, pp. 21-22, fols. 84-85.)

Even Captain Clarke did not say that she was by the head, or that her trim was bad, but what he did say was: "I accounted for the rank sheer in that way; if she was by the head—I couldn't judge of any other reason why she should take such a sheer." (Clarke, pp. 21-22, fols. 84-85.)

The Captain of the "Narragansett" evidently did not take very much precaution to avoid the "Bretagne," or to examine her closely to observe either her manoeuvres or her trim at this time for by his own testimony he has convicted himself of being a coward who deserted his ship. For he testified that he called to his men to get off and proceeded to get himself out of the way as soon as possible. As hardly more than a minute and a half elapsed from the time he obserced "La Breagne" to the moment of collision, and he was out of his wheel house and on the float when the vessels came together, it would seem that his observations are hardly worth consideration. Certainly it would seem that after observing "Bretagne" he did not take the proper precautions which a careful and competent navigator should take.

Another of the libellant's witnesses, Roberts, testified that she was on an even keel. (Colemann, p. 30, fol. 117.)

Page 3 of Libellant's Brief.

Counsel also has assumed to present to the Court certain language attributed to Captain Poncelet, which the Captain never used. (Libellant's Brief, p. 3.) Captain Poncelet at no time stated that the action of Pilot Sullivan was headstrong and dangerous, or that his action was a measure of desperation, or that the Pilot disregarded his remonstrances. (Captain Poncelet, p. 99, fol. 396; Captain Poncelet's Report, Exhibit E, p. 186, fol. 743.) He simply stated temporarily he was surprised, owing to the difficult situation in which his ship was placed, and that he asked the Pilot why he took that manoeuvre, but immediately recognized that while there was more room on the port hand the

Pilot's manoeuvre was a proper one in compliance with the rules, and one which would exonerate the "Bretagne." (Captain Poncelet, p. 97, fol. 388; Captain Poncelet's Report, p. 186, fols. 742-743.) This report was made while Captain Poncelet was on his ship on a continuation of the voyage on which the collision occurred, before he had consulted counsel, and was in compliance with the French Law requiring him to report to the Minister of Marine. The rest of the argument of counsel for the libellant consists entirely of inferences and inuendoes, although he purports to refer to the testimony contained in the record, but an examination of this testimony will not support the inferences drawn by the counsel for the libellant.

Counsel for the libellant refers to the opinion of the District Court (pp. 766-772), where the Court said:

> "The testimony of the respective sides supports the contention in a general way, but outside testimony makes it clear that the vessels were on courses to pass safely starboard to starboard."

It is quite evident that the District Court was unable to criticize the testimony from the "Bretagne" as being improbable and unworthy of belief, or as being fictitious, but relied upon the testimony of the outside witnesses which, as pointed out in the "Fourth" and "Fifth" points of this brief, does not, by any means, sustain the finding of the District Court.

As to the First Point of the Brief submitted on behalf of the libellant the following suggestions are made:

In the opening statement counsel for libellant says that "La Bretagne" failed to plead that the Main Ship Channel was a narrow channel.

The argument is an ingenious one, but hardly a fair one. In the first place, it is quite evident that on the trial counsel for the "Narragansett" understood that the "Bretagne" had pleaded the narrow channel rule, for, as part of the direct-examination of the Captain of the "Narragansett," counsel tried to prove a custom to violate the narrow channel rule.

It is quite true that the answer of the "Bretagne" does not refer to the narrow channel rule, nor does it refer to Article 25 in terms, but it does contain the allegation that the "Narragansett" crowded the "Bretagne" in the Channel (Answer, pp. 8-9, fols. 32-33.) Those words must have some meaning. If the collision had occurred in the open sea the words would have no applicability, but, since the collision occurred in the harbor and in the Channel, it must be quite apparent that counsel, in using such terms, was referring to the statute regarding narrow channels.

We notice in the libel in this case that counsel alleges five faults as against the "Bretagne," but fails to refer to any of the articles of either the International or the Inland Rules.

The "Bretagne" alleges five faults against the "Narragansett," but does not refer to the rules by numbers. It would seem to be ridiculous that counsel should pick out one allegation of an answer and complain that, because the article of the rules was not referred to, it was, therefore, not pleaded, but

that the other four allegations of fault, covering other articles of the rules, were properly pleaded, although the articles themselves were not mentioned by numbers.

"The Wildenfels," 161 Fed., 46, is hereby in point, as the effect of that decision is that a cause of action may not be changed from *ex delicto* to *ex contractu.*

Libellant's Brief, page 14.

Counsel for the libellant is very particular in referring to the similarity between the Harbor of Boston and the Upper Harbor of New York, and, in this connection, on page 14 of his brief, he refers to "Ellis Island, Communipaw, Bedloe's Island, Black Tom, Pennsylvania Railroad Terminal, Gowanus Bay, Red Hook and Governor's Island in New York Harbor."

Perhaps, in taking advantage of the change in maps, counsel is relying upon his statement contained in an earlier part of his brief, that he does not desire the Court to consider his references to charts and maps to be an admission that they are in evidence. Otherwise, he would hardly refer the Court to a situation existing at the present time which was not existing in 1904.

Since 1904, when this collision happened, the Black Tom Channel has been widened and deepened and made navigable, and since that time the Pennsylvania Railroad Terminal Channel has been constructed. Also since that time Governor's Island has been lengthened, and what was before navigable water for small boats is now being filled in, and "made land." The situation should be judged as of the year 1904, and not of the year 1910. If we take the situation in 1904, we will find

that Ellis Island, Bedloe's Island, Governor's Island, Communipaw, Red Hook, and even Black Tom Channel, did not begin to compare with the large number of islands surrounding the "President Roads, the channel to Boston Harbor, which has been held to be a narrow channel. An examination of the chart, entirely aside from personal knowledge of the Harbor of Boston, will disclose that there is at least as much, if not more, of what counsel calls "cris-cross traffic" in Boston Harbor than there is in New York.

Counsel's entire argument on this branch of the case seems to be based upon the sole contention that if the Channel may be crossed by vessels of light draft that, therefore, it cannot be a narrow channel.

We believe that the test is not as to what may cross the Channel, but as to what vessels the Channel was originally designed for. In New York Harbor, stretching from the Jersey Coast to the Long Island Coast, there is a distance of some six miles, which may be navigated by almost any tug and tow, but what is termed the "Main Ship Channel," where this collision occurred, is only intended to be navigated by vessels of deep draft which may not use the other six odd miles of the Harbor. The Main Ship Channel, where the collision occurred, is not more than 3,000 feet wide. The District Court Judge, in his opinion (p. 196, fol. 784), is in error in stating it to be 4,500 feet wide. An examination of the chart, and the Government regulations as to anchorage, will show that 3,000 feet is the utmost width of the Channel.

Libellant's Brief, page 19.

Counsel refers, on page 19 of his brief, to the

fact that five of the vessels referred to in the record were vessels engaged in "criss-cross traffic," and he cites the "Brinton," which was in on the anchorage grounds at the time; the "Independent," which was proceeding in the line of the Channel astern of the "Bretagne"; the "Rushington," which was a steamship anchored in the anchorage grounds, and the "Moonbeam," a barge anchored in the anchorage grounds, as the vessels engaged in this traffic. The inference is neither a proper nor a fair one, as the testimony shows that the vessels, either by their very nature, or by the courses they were on, were not, at the time, engaged in crossing the Channel.

Libellant's Brief, page 21.

On page 21 counsel also quotes the witness, Knott, as testifying that there is a custom among tugs and towboats, towing from Staten Island to the North River, to proceed on the westerly side of the Channel, and refers to the testimony of Captain Knott, p. 32, fol. 126.

An examination of the record will show that while the question was asked by counsel and an attempt made to put testiomny to that effect in the witness' mouth, the question was not answered.

In this connection we desire to call the attention of the Court to the fact that while the libellant attempted to prove a custom among the tug and towboat men to violate the statutory rule in this regard, there was no proof in the case to show that the custom was understood by everybody in the Harbor, or by everybody used to navigating in the Harbor waters. Proof of this was absolutely essential. Counsel for the "Narragansett" recognizes this rule, for in his brief, p. 26, he states that Captain Sullivan, being a Pilot for New York

waters, must have known of the custom, whether Captain Poncelet of the "Bretagne" knew of it or not.

Counsel also attempts to create an argument that the custom is a valid one, because, if those who violate the statutory rule did not have a custom to violate it, they would be delayed in the prosecution of their business, that is, of carrying cargo, and by violating the custom they make better speed than they would make if they obeyed the statutory rule. It is the first time we have heard such an arugment made. We have always understood that a violation of a statutory rule was actionable and that excessive speed, which helped to cause a collision, was also actionable. Would it be satisfactory to this Court in a collision case, which occurred in a fog, for the vessel, which was proceeding at excessive speed in the fog, to say that had she not done so she would lose time and not be able to deliver cargo within the same time she would by a violation of the rules of navigation?

If it is proper for a vessel to violate the Narrow Channel Rule in order to expediate her business, then we fail to see how it is improper for her to violate the rule of excessive speed in a fog.

Libellant's Brief, page 27.

The counsel for the libellant has taken some pains to attempt to reconcile the law where division of negligence is not considered, with the admiralty rule where it is considered and division of damages made. And, after citing some common law cases on page 27, which have no application to the case at bar, he then cites, in further support of his case, cases where the vessel which was exonerated was anchored in an improper place. This

situation is totally different from the one at bar, for the vessel at anchor, though being anchored in an improper place, has no means of relieving itself from the danger of the situation and should, therefore, not be held in fault where the other vessel has a full opportunity to avoid it. But in the case at bar both of the vessels were running free and each capable of changing its course and navigating in a manner to avoid the collision. Captain Clarke of the "Narragansett" testified (Clarke, p. 128, 129, fols. 512-514), that at all times his vessel was under ocntrol, but that he did not change or alter his course. To the contrary of the decisions cited by counsel for the "Narragansett," we refer the Court to the decision of this Court in the case of the "Ailsa" (86 Fed. Rep., p. 475), in which a vessel which was anchored in an improper place was held at fault. But this was because she was anchored in an improper place during a fog, and when the opposing vessel did not have a fair opportunity to see and avoid her. In the case at bar the injured vessel had ample opportunity to change its course and avoid the collision.

Libellant's Brief, pages 30, 31.

At pages 30 and 31 of libellant's brief, counsel cites authorities to the effect that an apportionment of damages is unjustified, notwithstanding a vessel is improperly anchored. This citation is of no assistance in this case for the same reasons argued immediately above, and for the further reason that in both the cases the "Clarita and the Clara" and the "Richmond" there was no question of the anchored vessel failing to answer the signals, and no question that by her action, after signals from the passing vessel, that she had enhanced the

danger to herself. The cases cited by counsel are without merit.

Libellant's Brief, page 32.

Counsel assumes that the "Narragansett" and the "Bretagne" were in sight of each other for two miles previous to the collision. The testimony is to the contrary that the "Bretagne" saw the "Narragansett" for about a mile or a mile and a half previous to the collision, but that the *"Narragansett" did not see the "Bretagne"* until she was three or four lengths away.

In support of his argument counsel cites the case of the "Portia" (64 Fed. Rep., 811). We hardly think that the decision of the Court in the case of the "Portia" is of any assistance to the libellant in the case at bar. In that case the action arose out of a collision in the East River. The "Portia" was held in fault, although the steam tugs and their tows were on the wrong side of the Channel; but the "Portia" was held solely in fault because she failed to stop and reverse when the situation was critical. There was no question, as far as the decision of the Court shows, that signals had been exchanged between the "Portia" and the tugs and tows in that case, or that the tugs and tows had failed to reply to the signals of the "Portia;" nor did it appear that the tugs and tows had only discerned the "Portia" when she was three or four lengths away. It did appear that each of the vessels had sighted the other at a sufficient distance apart to have changed their courses in accordance with the signals given, but that the signals were not given.

"The Portia," 64 Fed. Rep., p. 811.

Libellant's Brief, page 36.

The case of the "Calvin Austin," of which counsel has attempted to make a great deal at pp. 15-16 of his brief, and at p. 36, does not materially assist counsel for the libellant for the reason that the "Calvin Austin" was held in fault notwithstanding the "Reform" was on the wrong side of the Channel, because the "Calvin Austin" continued on her course "without giving any signals whatever and violating Rule 18 entirely, suddenly * * * without notice * * * ported her helm" and thus caused the collision.

> Calvin Austin, 9 Exch., C. R., 160, at p. 187.

We cannot forbear to call the Court's attention to the ingenious statement at the foot of page 36 of libellant's brief:

> "The purpose of the narrow Channel rule is to bring vessels into manoeuvring distant of each other in such a situation that the subsequent observance of those other rules, *which prescribe the movements of vessels in the presence of each other*, will enable them readily to avoid each other."

This has been the contention of the "Bretagne" during the litigation. We have complained of the "Narragansett" being on the wrong side of the Channel, and thus blocking the Channel and embarrasing the "Bretagne," and in addition that while there she failed to observe those *other rules* (keeping a lookout, Article 29, and answering signals, Article 18), which prescribe the *movements of vessels in the presence of each other.*

LASTLY.

The decree of the District Court should be reversed and a decree entered exonerating "La Bretagne," and finding the "Narragansett" solely in fault.

JOSEPH P. NOLAN,
Proctor for Libelant.

JOSEPH P. NOLAN,
JOHN M. NOLAN,
Advocates.

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

OCTOBER TERM, 1909.

No. 165.

THE BALTIMORE & OHIO RAILROAD COMPANY, OWNER OF CARFLOAT No. 160 N,

Libellant-Appellant,

vs.

THE STEAMSHIP LA BRETAGNE, HER ENGINES, ETC., LA COMPAGNIE GENERALE TRANSATLANTIQUE,

Claimant-Appellant.

BRIEF ON BEHALF OF THE LIBELLANT.

WALLACE, BUTLER & BROWN,
Proctors for THE BALTIMORE & OHIO RAILROAD COMPANY.

FREDERICK M. BROWN,
Advocate.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

INDEX.

		PAGE
Opposing versions of the collision		2
The decision below		5
	1. La Bretagne primarily in fault	5
	2. Reason for dividing the damages	6
I.	THE PLACE OF COLLISION WAS NOT A NARROW CHANNEL	7
	The test of a narrow channel	8
	Waterways heretofore considered judicially	9
	The Bee	12
	The Calvin Austin	13
	The Islander: The No. 4	17
	New York Upper Bay does not satisfy the test of a narrow channel	18
II.	NARRAGANSETT WAS NAVIGATING IN ACCORDANCE WITH A CUSTOM NOT PROHIBITED BY THE NARROW CHANNEL RULE	21
III.	NARRAGANSETT'S POSITION HAD NO CAUSAL CONNECTION WITH THE COLLISION	25
	The principle in *Davies* v. *Mann*	28
	Same applicable in Admiralty	30
	Neither improper anchorage	32
	Nor violation of the East River statute is necessarily a contributing cause	32
	The Portia	34
	Technical violation of narrow channel rule is immaterial	36
	No logical ground of apportionment here	39
	Long Island Co. v. *Killien*	42
	The Clara	43

PAGE

IV. La Bretagne sheered from a starboard to starboard position..... 45

A. The District Judge saw and heard the important witnesses..... ... 45

B. The evidence..... 46
1. Why libellant's proofs superior... 46
2. Story of libellant's witnesses..... 47
3. Conflicting stories of steamer's pilot and captain..... 53
4. Inherent probabilities..... 55

V. La Bretagne negligently tardy in reversing..... 57

VI. No material deficiency of lookout on either vessel..... 58

VII. Narragansett not in fault in the matter of whistling..... 61

VIII. At the utmost only a doubt concerning Narragansett's navigation.... 64

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

THE BALTIMORE & OHIO RAILROAD COMPANY, owner of Carfloat No. 160 N,
Libellant-Appellant,

vs.

The Steamship LA BRETAGNE, her engines, etc., La Compagnie Generale Transatlantique,
Claimant-Appellant.

Reported below, 148 Fed., 477.

BRIEF ON BEHALF OF THE LIBELLANT.

These are cross appeals from a decree of the District Court in Admiralty awarding half damages to the Baltimore & Ohio Railroad Company in respect of the injuries received by its carfloat B. & O. No. 160 N in consequence of a daylight collision with the French Line steamship La Bretagne near Liberty Island, New York harbor.

An enlargement from the appropriate government chart will be found at the end of this brief, showing the approximate location of the place of collision, the relative positions of the vessels and the character of the waters in which the vessels had been navigating, for it was held by the District Court (erroneously, as we contend) that these constituted a narrow channel.

At the time of the collision, the injured carfloat was being towed on the starboard side of the Baltimore & Ohio steamtug Narragansett and carfloat No. 67 was being towed on her port side.

The tug and two carfloats were on a trip from St. George, Staten Island, to Pier 32, North River. The French steamer was just beginning one of her regular voyages to Havre, France.

The libellant, without attacking the findings of fact of the District Court in any important particular (for the manœuvres of the Narragansett and her floats, after the vessels came within manœuvring distance, have been fully justified by the District Court), appeals from the conclusion of law that the Narragansett was in part responsible for the collision, because she was navigating the westerly or port side of a water way which (although the point was not pleaded) the District Court regarded as a "narrow channel."

The claimant, on the other hand, appeals solely from a finding of fact; the finding that from a starboard to starboard situation, La Bretagne sheered into the Narragansett's tow.

Opposing Versions of the Collision.

1. The explanation of the collision, as it was told in the presence of the District Judge by five masters of disinterested vessels in the vicinity, as well as by libellant's crews, was that La Bretagne and the steamtug *Nettie Tice*, in the vicinity of Liberty Island, were approaching each other head and head within the meaning of Inland Rule I, of Article 18 (Coleman, 109*); that the *Tice* accordingly blew one whistle to her (108) and La Bretagne answered with one (Coleman, 111; Day, 183), and sheered under a port helm towards the Narragansett, theretofore in a starboard to starboard situation with reference to La Bretagne (Coleman, 112; Day,

* Numerals refer to folios of the Record, unless otherwise stated.

188; Knott, 124, 125; Roberts, 148; Clarke, 64, 65); that La Bretagne sheered more (Roberts, 158) than pilot Sullivan had probably anticipated, (possibly on account of her bad trim, Knott, 136; Clarke, 84, 85) and did not straighten back on her former course, as she should normally have done; that, at all events, pilot Sullivan made a perfectly foolish attempt, by continuing and increasing his sheer, to pass completely across the course of the Narragansett to the westerly side. In this headstrong and dangerous (Poncelet, 396, 743) measure of desperation, which took Capt. Poncelet completely by surprise (Poncelet, 390, 475, 739, 742, 743, 752), the pilot disregarded the remonstrances of the latter (740, 743, 744), called for the steamer's *utmost speed* (Sullivan, 293, 322, 733) and ordered the helm *hard aport* (Poncelet, 420, 453, 739; Morise, 718, 719, 645; Le Guillon, 685; Sullivan, 230), but without success.

The Narragansett had apprehended no danger to herself while the *Tice* and La Bretagne were exchanging signals, nor until the steamer's sheer became "rank" (Clarke, 70), thus giving the first indication of a possible attempt to cross the Narragansett's course, whereupon the latter immediately reversed, blowing alarm signals (Coleman, 114; Day, 185, 186; Roberts, 146; Gallagher, 175; Sullivan, 323). Pilot Sullivan, after a period of uncertainty, alternating between "hard aport" and "steady" orders (Poncelet, 739, 743, 744), was finally persuaded by Capt. Poncelet (744; Roch, 536) to permit a reversing order to be given and alarm whistles to be sounded (Poncelet, 352; Sullivan, 331), although admittedly (Sullivan, 329; Poncelet, 492) not until after the Narragansett had been sounding hers.

But Capt. Poncelet intervened too late. The Bretagne's headway was not to be overcome. Float No. 160 N, at a point about one third of her length from the bow, was deeply cut into and broken adrift. Seven of her cars were thrown into the waters of the Bay, their contents injured and the

salvage services of outside vessels were made necessary; libellant's entire losses amounting to $27,400, exclusive of interest.

2. The case of the French Line was based on the contention that it was the Narragansett and not the *Tice* that was directly ahead (Poncelet, 418; Guillon, 675) or half a point on the starboard (Le Louarn, 702) or port bow of La Bretagne, when the vessels approached within manœuvring distance of each other, and that the collision was due to the tug's failure to port and pass to the eastward of the steamer. The French Line's principal witnesses do not agree with each other, and the pleadings are silent as to whether it was originally a port-to-port situation or a crossing-course situation. They offer no excuse for not holding her course, if, as they say, the Narragansett was the burdened vessel (Poncelet, 452, 470, 743, 461).

The only charges against the Narragansett that are pleaded in addition to that already referred to are crowding upon the Bretagne, failure to maintain a proper lookout or slow, stop and reverse (32, 33).

The Bretagne *did not plead* that these waters were a narrow channel or that the Narragansett was in fault in navigating on the wrong side of them; nor did she offer the slightest evidence of the facts pertinent to such an inquiry and evidence upon that subject, proffered by the Narragansett, was excluded for want of an appropriate issue (Record, fols. 57, 127). Not a chart or an anchorage regulation (of which the courts will not take judicial notice, *The E. A. Packer*, 140 U. S., 360; 58 Fed., 251, 255), has been offered in evidence, nor has the length, the navigable width or the depth of the channel or water way that the colliding vessels were using, been proved.

The Decision Below.

1. The District Judge, in whose presence every witness of importance was examined, found that the collision occurred in every essential particular as stated in the pleadings and by the witnesses for the libellant.

In his opinion, after stating the opposing contentions of the two parties (Opinion, 766–772), the Judge says:

> "The testimony of the respective sides sup-
> "ports the contentions in a general way, but
> "outside testimony makes it clear that the
> "vessels were on courses to pass safely star-
> "board to starboard, if neither had changed.
> "Such testimony comes from several tugs
> "navigating in this vicinity" (Opinion, 773).

The Judge proceeds to point out the conclusive character of the testimony given by the masters of the tugs to which he refers, viz., the *Nettie Tice*, the *Brinton* (whose master was afterwards transferred to the Overbook), the *Independent*, the *New York Central No. 10* and the *Charles Runyon* (Opinion, 773–778).

The Judge then calls attention to the fact that the testimony of the Bretagne's pilot to the effect that the vessels were slightly port to port at their original approach

> "was not fully sustained by the master who
> "was on the bridge, who said he saw the star-
> "board side of the tow looking as if it was
> "trying to cross the steamer's bow and go to
> "the western part of the channel and he
> "asked the pilot 'Why do you come to the
> "starboard?' The master evidently regarded
> "as a *wrong manœuvre* the steamer's change
> "to the right" (westward) "under the cir-
> "cumstances" (Opinion, 780, 781).

The real explanation of the collision as found by the District Judge is contained in the next paragraph of his opinion.

> "The great preponderance of the testimony
> "shows that the vessels were in position to

> " pass safely starboard to starboard and that
> " the collision was produced by a change on
> " the part of the Bretagne to the starboard
> " without an agreement to that effect with
> " the tug. I had no doubt of this at the time
> " of the trial and an examination of the
> " minutes of the testimony confirms my belief
> " that she was primarily in fault for the col-
> " lision " (Opinion, 782).

2. The ground on which the District Judge nevertheless divides with the tug Narragansett the responsibility for this collison seems to us, with profound respect, most surprising.

Although the Narragansett and her tow were visible and were in fact seen on this clear, sunlit morning at a distance vastly greater than necessary to enable the Bretagne, with even the slightest skill and attention to rudimentary principles, to avoid collision by merely preserving the starboard to starboard situation without change of course, the Narragansett is condemned for her *mere presence* where she was. A northbound vessel in the westerly half of those navigable waters which are regarded by the District Judge as constituting a narrow channel within the meaning of Article 25 is apparently regarded as necessarily and inevitably guilty of fault contributing to the collision, if collision there be while in that situation, brought about in any possible manner. The District Judge says:

> " The troublesome feature of the case is the
> " fact that the tug and tow were on the
> " wrong side of the channel under Article 25"
> (Opinion, 783). " . . . The principal dis-
> " tinction between that case " (that of *The Lowell M. Palmer*, 142 Fed., 937) " and the one
> " under consideration is that there was no
> " agreement to pass to the right. The Bre-
> " tagne sought to make such an agreement,
> " but it was not assented to by the tug, which
> " did not answer the former's navigating sig-
> " nals, but stopped and backed upon receiv-
> " ing the signal of the Bretagne and seeing
> " her sudden sheer. The tug was aided by

" the tide in her efferts to stop and probably
" had overcome her headway at the time of
" the collision, so that there was *no observ-*
" *able fault on her part except that of being*
" *on the wrong side of the channel*" (788, 789).
. . . " Of course if there had been an
" agreement to go to the left, the Bretagne
" would be solely liable under *The Bee, supra*"
(*The Lowell M. Palmer* is probably intended).
" In the absence of such an agreement, I am
" unable to see how the Narragansett can be
" wholly exonerated. Her presence on the
" western side of the channel was clearly *a*
" *contributing fault, because if she had been*
" *where the law required her to be there would*
" *have been no collision*" (791).

I.

No part of the inner or upper harbor of New York is a narrow channel within the meaning of Article 25.

We are making the present point under compulsion of the decision below, for it was not pleaded by La Bretagne that these waters constituted a narrow channel nor were the proofs directed to that issue. No such charge should therefore have been considered by the District Judge.

The Wildenfels, 161 Fed., 864.

No statement or chart contained in this brief is intended as a waiver of proof of any of those facts which should have been proved by La Bretagne.

Article 25 appears in identical language both in the International Rules and the Inland Rules as follows:

" Art. 25. In narrow channels every steam
" vessel shall, when it is safe and practicable,
" keep to that side of the fairway or mid-
" channel which lies on the starboard side of
" such vessel."

Although the rule has been in existence in England in one form or another at intervals since 1840, the meaning of the phrase "narrow channel" as used in the rule has never been satisfactorily defined in any judicial decision.

We have been unable to find any case in which the fact that a stretch of water deep enough for ordinary commerce extends in one direction for a considerable distance as compared with the breadth of the water has *of itself* been treated as sufficient to constitute it a narrow channel.

Whatever else the definition may include, it must clearly be one that will apply to vessels of varying drafts, for one vessel cannot hail another to ascertain the draft of the latter before deciding to rely on the assumption that she is treating the waters in question as a narrow channel.

In all or nearly all of the decided cases, it will be found that relatively narrow waters to which the rule has been applied, constitute a mere route of communication between two or more frequented places and do not, within themselves, contain any significant piers or landing places which might presumably be of themselves points of arrival or departure for vessels.

It is submitted that the term "narrow channel" within the meaning of the statute is not capable of any rigid or exact definition, but that it is essentially a *relative* expression and is used to define those (necessarily narrow) waters so situated and of such depth that the steam vessels plying in them will be compelled, in nearly all cases, by the nature of the situation to navigate in parallel lines; so that those vessels whose normal business, within the waters in question, would require their navigating in directions varing from the general direction of traffic would compose a negligibly small fraction of the whole.

If the phrase be defined in the manner suggested, there will be no hardship, but every advantage in compelling vessels to keep on the starboard side.

But if a long stretch of waters, claimed to be a narrow channel, has numerous wharves on one or both sides or is tapped at numerous points in its length by diverging routes that lead to wharves or landing places in the immediate vicinity (conditions that pertain principally or entirely in important harbors), the necessities of steam vessels in swinging to make their landings in the varying conditions of tide to be encountered, and in turning from or into the diverging routes referred to, would obviously prevent them from conforming with that particular principal for the avoidance of collisions which is attempted to be embodied in the narrow channel rule. In such case, it would be productive of confusion and danger and not conducive to safety or order to lay down a rule of the road for waters to which its application, by reason of the very nature of the waters themselves, could not be substantially uniform. Congress could not have intended to include such waters within the scope of its undefined phrase "narrow channels." It must have intended by "narrow channels" such narrow waters as would permit vessels substantially uniformly to keep to starboard.

Before applying these principles to a solution of the question whether the place of the Narragansett-Bretagne collision was a "narrow channel" we will refer briefly to the waters that have been considered in the decided cases.

Water-ways that have been judicially considered.

In 1862, the question was presented to Privy Council whether the sea end of Queen's Channel, the principal approach to the Port of Liverpool, was a narrow channel within the meaning of the rule and it was held not to be so. Although the navigable waters at the place of this collision were unquestionably narrow, their situation at the end of the channel would make it probable that vessels might at this point be converging and diverg-

ing in various directions and that a prevailing state of parallelism of their courses would, therefore, not be attained at this point. Whether the reasoning of the Court in deciding the point was as just suggested does not appear from the opinion, which is extremely brief.

The Maeander, 1 Moore P. C., N. S., 63, 68.

The earliest case in which the question appears to have been considered, whether narrow water ways within the limits of important harbors can be regarded as "narrow channels" within the meaning of the statute directing vessels to navigate on the starboard side, is that of *The James Bowen*, 52 Fed., 510, decided by Judge Butler in 1892.

The tug Weed, while proceeding up the Delaware River, close to the westerly or port side, was sunk by the tug Bowen within the waters of the harbor of Philadelphia. That the Delaware River outside of Philadelphia is a narrow channel within the meaning of the rule has been frequently held. *The Maling*, 110 Fed., 227. Judge Butler says:

> "It is a sufficient answer, I think, to the "second point, to say that the Weed was "not wrongfully on the western side. The "custom respecting this part of the river "justified her. The sailing rules prescribed "by the Act of 1885" (*i. e.*, in respect of navigation of narrow channels) "do not "apply to the locality which is within the "port of Philadelphia."

Practically all the cases applying the narrow channel rule prior to 1903 have been industriously collected by Judge Holt in *The Bee*, 127 Fed., 453.

None of them, it is respectfully submitted, support the conclusion reached by Judge Holt in that case, that the Upper Harbor of New York was a narrow channel nor do they tend to show that any waters bordering, or adjacent to which frequented piers, landings or anchoring places are located or in which an appreciable portion of the traffic must

necessarily be conducted on lines divergent from or making varying angles with the axis or principal length of the waters in question constitute a narrow channel.

The part of the Elizabeth River where the Victory and the Plymothian approached and collided was well to the northward of the utmost limit of the piers, landing places or anchorages of the port of Norfolk. *The Victory*, 168 U. S., 410.

The portion of the Delaware River involved in the case of *The Muling*, 110 Fed., 227, was near an artificial channel called Cherry Island cut. There was no landing or anchorage places of consequence in the vicinity.

The same is true of that portion of the Potomac River between Washington and Alexandria involved in the case of *The Newport News*, 105 Fed., 389; and of the Providence River near Sabin's Point, which is several miles below the limits of the harbor of Providence. *The Berkshire*, 74 Fed., 906.

There is no suggestion that the portions of the Danube and Whang Poo Rivers considered by the Privy Council in the cases of *The Spearman*, 10 App. Cas., 276, and of *The Pekin* [1897], App. Cas., 532, were in the vicinity of settlements, piers, wharves or anchorages, although it appears that the Whang Poo was buoyed at the place in question to indicate the location of deep water.

On the other hand, it is clear that the Cardiff Drain, the President Roads, the Brewerton Channel of the Patapsco River and the Main Ship Channel in the Lower Bay of New York are waters that serve but a single purpose, viz: to permit ships to approach or to leave the harbors of Cardiff, Boston, Baltimore and New York respectively; waters where the normal course of every ship is approximately parallel to that of every other ship.

The Leverington, 11 Prob. Div., 117.
The Yarmouth, 100 Fed., 667.
The Acilia, 108 Fed., 975.
The Sea King, 114 Fed., 535.

The fact that the Straits of Messina and the waters of the Golden Gate forming the approach to San Francisco harbor must be almost entirely used by through traffic on parallel lines is also manifest.

The Rhondda, 8 App. Cas., 549.

Occidental Co. v. *Smith*, 74 Fed., 261.

Since the sketch of the decisions on the narrow channel rule made by Judge Holt in *The Bee*, the development of the law of narrow channels is indebted primarily to one Canadian decision and three decisions of this court.

The Bee.

With the possible exception of *The James Bowen*, *supra*, it was apparently not until the case of *The Bee*, 127 Fed., 453; 138 Fed., 303, that any court has been asked to apply the narrow channel rule to those waterways which are included within the confines of the harbors of important ports. The collision in that case occurred in the Upper Harbor of New York off Bay Ridge near a junction between certain routes referred to in the decision as Bay Ridge channel and Main Ship channel, respectively, and probably in the somewhat shallower water between these two routes or channels.

Judge Holt considered that the two channels, taken together and including the shallower water between them, but excluding the anchorage ground on each side, would constitute for those vessels which were involved in the collision in question (namely, light draft tugs and scows), a narrow channel within the meaning of the statute.

On appeal to this Court, it was held that both tugs were in fault for not porting sufficiently to provide a reasonable margin for clearance and that the narrow channel rule was not involved in the decision. Nevertheless, this Court regarded Judge Holt's doctrine as constituting an error of sufficient importance to require correction. This Court indi-

cates clearly that the several principal waterways *below* the Narrows are narrow channels within the meaning of the statute. For the Court says:

> "It was held in that case" (*The Sea King*, 114 Fed., 535) "that Rule 25 applied to the "Main Ship channel" (*below* the Narrows) "in which the Sea King was navigating and "the opinion indicates that the *same rule* "would have been applied had she been "navigating in either the *Swash* channel or "the *East* channel which run in the same "general direction" (at p. 306).

But, although this Court in that case refers to the fact that in the upper harbor there are two similar water routes or channels, it carefully abstains from intimating that each of them is to be considered a narrow channel within the meaning of the rule. The Court says:

> "It is sufficient on this appeal to hold that "in the case of a bay which is also a port or "harbor, the entire body of navigable water "is not to be considered a single narrow "channel within Rule 25 where through such "bay there have been officially designated a "plurality of channels (*i. e.*, more than one "channel) running substantially parallel "with each other and in the same general "direction as the main flow of the tide or "current" (at p. 307).

The caution of this court in that case in not extending to the *upper* harbor the rule which it clearly recognized as applicable to the lower harbor is extremely significant.

The Calvin Austin.

The next decision in order of time, that in the case of *Lovitt* v. *The Calvin Austin*, 9 Exch. C. R., 160, 181; 35 Can. Supr., 616, 622, resembles in its facts the present case more closely than any other to be found in the decisions.

The steamer Calvin Austin had left Commercial

Dock, Boston, bound for sea. She directed her course to the starboard or South Boston side of the waterway, overtook, and passed under the stern of a schooner in tow outward bound, and immediately afterward collided with the Reform, an inward bound barque in tow, the collision occurring one mile from Commercial Dock and close to the South Boston shore, opposite Bird Island Flats (see Government Chart, No. 248). The question was whether the barque Reform (which was conceded to be responsible for the course adopted by the tug that was towing her alongside) should be held partly in fault for the collision as being on the wrong side of the channel and therefore embarrassing the navigation of the Calvin Austin which came upon her unexpectedly from behind a five-masted schooner.

The features of similarity between the two cases are these: (1) there is no succession or line of piers or wharves immediately bordering the channel or water way in question on either side; (2) nearly abreast the place of collision on each side, but somewhat back from the margin of the water way are occasional piers (the Jeffries St., Marginal St. and Northern Ave. wharves in Boston harbor and the Ellis Id., Communipaw, Bedloes Id., Black Tom, Pennsylvania R. R. Terminal, Gowanus Bay, Red Hook and Governors Id. piers in New York harbor); (3) there is a continuous line or succession of wharves or piers lining the water way in question in each instance, but terminating at a distance of about one mile from the place of collision; (4) there is relatively shallow water immediately adjacent to the water way in question in both cases, and this, in both cases, is intersected by minor lateral channels, both above and below that point in the principal waterway where the collision occurred; (5) in each case, the point of collision was within the inner harbor or bay, but not in either of the rivers that flow into that bay.

The only significant difference between the two cases is that the part of Boston harbor involved in

The Calvin Austin case is less than one third the width of the water way where the Bretagne-Narragansett collision occurred, as found by Judge Adams (Opinion, 784). Moreover the Boston channel is essentially an artificial one; it is the result of very considerable deepening and broadening by dredging. Says Mr. Justice McLeod:

> "This collision occurred in what is known "as Boston Inner harbor, where ships are "anchored, and they were anchored on each "side of it at the time this collision occurred. "Indeed, there are wharves on both sides "where the collision occurred, so that it "seems to me to fill all the conditions of a "harbor. Then, *if it is a harbor, I cannot "think that the rule*" (*Article 25*) "*applies.* "No case has been cited to me, and I find no "case where the rule is applied in a harbor; "and indeed I think it would be somewhat "difficult to apply it because vessels or tugs "are continually plying back and forth, and "it seems to me they must be governed in "their meeting or passing by signals that are "given."

On appeal to the Canadian Supreme Court, it was said, by Sir Louis Davies, *J.*:

> "The respondents submitted that the Inner "harbor of Boston after passing inwardly "the buoy indifferently called the 'Gas "Buoy' or 'Buoy No. 9'" (near Castle Island), "was not a narrow channel within "the meaning of article 25; and, secondly, if "it was, the circumstances proved fully jus- "tified the Reform and her tug in keeping to "the southern side of that harbor.
>
> "The local judge in admiralty, Mr. Justice "McLeod, held both contentions of the res- "pondent well founded. We are of the opinion "that he was right on both points. . . .
>
> "We are of the opinion that neither the "language nor the reason of the rule are prop- "erly applicable to the inner harbor. As it "appears from the chart, the line of the inner "harbor forms a kind of a semi-circle and

"is almost entirely lined with docks and "wharves.

"The depth of water from the docks on the "north side to those on the south side and "from those on the west to the place of col- "lision, nearly out to the Gas Buoy, is prac- "tically uniform. There is no fairway or "mid-channel in this inner harbor to which "the words of the rule could apply or by "which ships sailing in it could be guided. "When vessels reach this inner harbor, they "either anchor under the direction of the "harbor master or proceed straight to their "dock or wharf wherever that is, in North, "South or West Boston. The waters in front "of these docks are used as anchorage "grounds under the direction of tbe harbor "master. Several small rivers run into this "inner harbor, but they do not affect the "question now in consideration. From the "gas buoy seawards, the evidence and the "charts show there is what might be called "a narrow channel, in whole or in part."

The gist of this decision is that the waters near Boston should be divided between the *harbor* proper and the *approaches* to the harbor, the dividing line between the two being at the Gas Buoy near Castle Island. In the case of New York, the analogous dividing line would clearly be at the Narrows; and the waters opposite Yonkers (and also opposite Ludlow, 145 Fed., 15) would not be a part of any harbor (there being no significant commerce at that point), but an approach to the great port of New York.

The Benjamin Franklin, 145 Fed., 13.

It cannot fairly be said that the waters where the Bretagne-Narragansett collision occurred are more closely analogous to President Roads, Boston (held to be a "narrow channel in *The Yarmouth* 100, Fed., 667) than to the scene of the *Calvin Austin* collision. The only land in the vicinity of President Roads consists of certain small islands (Spectacle Id., Long Id., Gallops Id., Lovells Id., and Deer Id.,)

upon which are located one or two public hospitals and which have a few landings, used only occasionally by municipal steamers. These islands are comparable with Hoffmann Id. and Swinburne Id. in New York Lower Bay. There are no frequented wharves for commercial purposes near President Roads; nothing in the least comparable with the succession of Brooklyn piers extending almost to Bay Ridge or with the Black Tom terminal of the Lehigh Valley Railroad.

The Islander and the No. 4.

The decisions of the two Canadian courts received the approval of this court in the case of *The Islander*, 152 Fed., 385, 386. The question in that case was whether that portion of the North River between 23rd street and the Upper Bay was a narrow channel. Says Judge Lacombe:

> "The shores on each side are fully built
> " upon. With the exception of the shoal water
> " at Weehawken Cove and a few hundred
> " yards along the high bank at Castle Point,
> " there is an unbroken succession of bulk-
> " heads, wharves, piers and slips upon both
> " sides of the river. . . . We are clearly
> " of the opinion that such a locality cannot
> " be held to be a narrow channel within the
> " meaning of such words as used in the rules
> " of navigation."

The same principle was extended to the waters above Twenty-third street in the case of *The No. 4*, 161 Fed., 847, 850. In that case, Judge Ward says:

> "The *ratio decidendi* of the latter case"
> (*The Islander*) " is that *channels within the*
> " *rule are bodies of water navigated up and*
> " *down in opposite directions*, and that there-
> " fore harbor waters with piers on each side
> " where the necessities of commerce require
> " navigation in every conceivable direction,
> " up and down, across and up and down be-
> " tween piers on the same side, cannot be
> " considered narrow channels. The only
> " difference between the waters below

"Twenty-third street and above it within the
"city limits is, that the government has des-
"ignated by buoys an anchorage ground
"from the west side to nearly midstream be-
"tween Twenty-fifth and Forty-first streets.
"This would seem to be an additional reason
"for not applying the narrow channel rule,
"since its enforcement would require south-
"bound vessels to navigate through the
"anchorage grounds, which, though lawful,
"is, when possible, to be avoided."

The waters of the Inner Bay of New York are not a narrow channel.

It is submitted that the waters of the upper bay of New York Harbor abreast of Liberty Island, Ellis Island or Governor's Island, or, indeed, any part of the waters of the Upper Bay of New York, do not fall within the definition of a narrow channel because those waters are not the scene of a substantially unvarying traffic, normally moving on parallel lines. It may or may not be true that as much as half of this traffic passes to and fro between the North River and the Narrows in a direct line. What is important is that *a considerable part of this traffic does not do so.* It diverges to Communipaw just south of the Central Railroad of New Jersey, to the wharves at Governor's Island, at Ellis Island and at Liberty Island, to Black Tom, to the Pennsylvania Terminal and to the wharves that line the Kill van Kull. It diverges also into the East River, into Buttermilk Channel, into Red Hook Channel, into Gowanus Bay and into Bay Ridge Channel, with a continuous succession of wharves lining the Long Island shore from a point abreast the Battery almost to Bay Ridge, several miles below the place of this collision.

Further than this, the entire channel or water course in question is bordered on both sides by general anchorages (Govt. Chart No. 541). Indeed, it would be more correct to say, a portion of the channel or water course in question is set aside for

anchorages, the latter view of the matter having apparently received the approval of this court in the case of *The No. 4*, 161 Fed., 847, 850.

Mr. Hughes says of the narrow channel rule

> "It hardly seems to apply to harbors, "steamers moving from one wharf to an- "other further down on the same side can "scarcely be expected to cross the harbor "and then cross back" (Hughes' Admiralty, Sec. 136, p. 252).

The same reasoning applies also to anchorages (*The Calvin Austin*, *supra*), and to lateral cross channels or water courses.

Suppose a deep draft vessel were to leave Black Tom bound for Ellis Island. Would she be viola ting the law unless, in accomplishing this distance, she were to cross over to the Governor's Island side and then cross back to Ellis Island?

Suppose a vessel were to leave the Governor's Island wharf near Castle William bound for Erie Basin, would she be violating the law, unless she crossed over to the waters adjoining Liberty Island anchorage before crossing back to the Brooklyn side?

Suppose a vessel were to come in from the sea bound either for the Liberty Island anchorage or for the anchorage just below it, that for explosives, would she be bound to navigate along the Brooklyn side of the channel until nearly abreast of her desired position and then make a right-angle turn across the channel?

Shall it be said that the Staten Island ferry-boats leaving St. George, instead of following the westerly side of the channel, as they now do, must head square over to the eastward until they have approached the margin of the channel on that side before turning to the northward?

Whether the application of the narrow channel rule to these waters would or would not (because of its somewhat qualified language) logically prohibit

the doing of the very reasonable acts above suggested, it is enough that a very substantial volume of commerce cannot reasonably be conducted in the waters in question along a single axis or direction. It is submitted that the volume of this commerce is sufficiently great in proportion to the total commerce in these waters to forbid classing the latter as a narrow channel within the meaning of the statute.

The claimant has omitted to furnish any information which would have enabled the Court to compare the volume of the "up and down" traffic in these waters with the volume of "criss-cross" traffic. It is, nevertheless, a suggestive fact that out of *nine* vessels which are shown by accident in this case to have used these waters, *five* vessels (the Brinton, N. Y. C. No. 10, Independent, Rushington and Moonbeam) when navigating through these waters, belonged to the "criss-cross" traffic. Only two were bound between the Narrows and the strait between Governor's Island and Ellis Island; which, we presume, the claimant will designate as the northern gateway of the channel.

We respectfully submit that the narrow channel rule is no more applicable to the inner harbor of New York than to the inner harbor of Boston.

As Congress has not seen fit to describe any waterway in the inner harbor of New York as a "narrow channel," it is believed that none of them are properly to be so regarded, and that it cannot make the least difference that some officer of the government, after the adoption of the narrow channel rule, has seen fit to describe certain waterways, for a totally different purpose, as "channels" (see *The Bee*, 138 Fed., 303, 306).

It may nevertheless be pointed out that of the various waterways in the Upper Bay, that to the eastward of the line from Ellis Island to Robbins Reef (the waters here in question) must, on account of its situation and its greater breadth, have a larger proportion of "criss-cross" traffic than any other.

It is also conspicuous as a water way which has not been designated as a "channel" for any purpose by any governmental authority.

Only the following have been designated as "channels" in the Anchorage Regulations of the Treasury Department and its successor, the Department of Commerce and Labor.

Ellis Island Channel,
1902; Sec. 18, plate V,
1907; Sec. 20, plate V.
Bay Ridge Channel,
1902; Sec. 19, plate VI,
1907; Sec. 21, plate VI.
Red Hook Channel,
1902; Sec. 19, plate VI,
1907; Sec. 21, plate VI.
Black Tom Channel,
1902; plates V, VI,
1907; Sec. 20, 27, plate VI.
Greenville Channel,
1907; Sec. 20, 27.
Buttermilk Channel,
Government Chart No. 369.

II.

The narrow channel rule does not prohibit heavy tows, proceeding up the harbor from Staten Island to the Hudson River in the early stages of the ebb tide, from taking advantage of the slack water on the westerly side of the waterway, in accordance with a well recognized custom.

By the express language of the rule, vessels are not required to navigate in the starboard half of a narrow channel unless it is "practicable."

The Benj. Franklin, 145 Fed., 13, 16,

That the existence of such tidal currents as the Record here shows would bring the case within the express exception of the statute is plainly the opinion of Judge Holt.

The Bee, 127 Fed., 453, 455.

It is in evidence, and not rebutted by steamer's counsel (Knott, 126), that there is a well recognized custom under which vessels towing heavy floats and barges from Staten Island to the North River at about high water slack, when the tide is ebbing out of the East River and flooding into the North River (that is, setting to southward on the easterly side of the Bay, Roch, 587, and slightly to northward or slack on the westerly side of the Bay) to lay a course on the westerly side of the channel, just as the "Narragansett" did (Clarke, 102).

As La Bretagne *did not plead* that the waterway where this collision occurred was a "narrow channel," evidence of the character just stated, tending to show what would be proper navigation in a "narrow channel," was excluded by the District Judge when first offered by the libellant, on the ground that "it is not an issue here" (Clarke, 57). This ruling was relaxed once on account of a waiver imputed to steamer's counsel (Clarke, 95, 99), but with this exception, it was persevered in (Knott, 127).

Libellant stood ready to prove by numerous witnesses (whom it was, in fact, not permitted to examine) that substantially the course pursued by the Narragansett was a practical necessity in a commercial sense. The exclusion of this evidence, under the pleadings as they stood, libellant believes to have been correct.

It is therefore a matter of great surprise to be compelled by a decision of the District Court, founded wholly upon a contention for which no foundation was laid in the pleadings and with reference to which libellant's evidence was excluded for want of an issue under the pleadings, to call to

the attention of this Court such evidence concerning the character of the channel and concerning the necessities of commerce therein, as, by a happy accident, finds a place in the Record.

The custom above referred to (Clarke, 102) is a perfectly reasonable one and not inconsistent with the statute, because, unless vessels were permitted to take advantage of the natural set of currents, it would be *impossible* for steamtugs, with the size of tows they are now in the habit of handling, *to make headway* against the tide *and reach their destinations* except during about half the time that they are now effective. Such a fettering of the instrumentalities of commerce would not be commercially "practicable." To say that a departure from the general principle of the rule stated in Article 25 cannot be sanctioned by a reasonable custom of this sort, would be to put a heavy burden upon the very interests which the law is designed to nurture and protect.

A similar custom exists in some parts of the East River and of the Delaware River, where the ebb or flood tide runs at its full strength in the center, but is weaker at the sides. The custom is for vessels making headway against the tide to keep away from the center of the river towards the two sides and it has been sustained as valid, where not unreasonable because essentially dangerous.

The James Bowen, 52 Fed., 510.

In other parts of the river, the tide makes along one shore, with an eddy or back-current on the opposite side. In such case, custom usually sanctions taking advantage of the current both ways, even if it take vessels to the port side of the center.

In the case of *The Lowell M. Palmer*, 142 Fed. Rep., 937, 943, a tug of that name coming down the East River toward the Battery, well over on the Brooklyn side of the river, in apparent violation of Article 25 (if it ever applies in harbors), and also of the State Statute of New York State requiring ves-

sels navigating the East River to keep as near as possible to the middle of the river, brought her tow into collision with that of the tug Wrestler, the latter being bound across the river from New York to Brooklyn and eventually up the river. Says Judge Coxe:

> "The proposition that the 'Palmer' was at
> " fault for coming down on the Brooklyn side
> " cannot be maintained. It appears that there
> " is a well recognized custom, when the tide
> " is at flood, for ascending vessels to take the
> " New York side and descending vessels to
> " take the Brooklyn side between the Navy
> " Yard and the Bridge.
> " In this way both vessels are able to take
> " advantage of tide conditions. *Prudence and*
> " *convenience alike seems to require that such*
> " *a course be taken.*"

See also:

The E. A. Packer, 20 Fed., 327, 332; 58 Fed., 251, 256.

Lake Erie Transportation Co. vs. *Gilchrist Transportation Co.*, 142 Fed., 89.

In the case of *The Lowell M. Palmer* the custom, in spite of the statute, was sustained by Judge Coxe, because, in the locality in question, the effect of the flood tide is to create a current running in one direction on the Brooklyn side of the river. The custom was there regarded as reasonable and valid because the fair necessities of commerce require that vessels should be enabled to take advantage of the favorable current. Exactly the same conditions exist at high water slack in the Upper Bay, when the tide is ebbing out of the East River and flooding up the North River at the same moment. The identical reasoning adopted by Judge Coxe in the case of *The Lowell M. Palmer*, requires supporting the validity of the custom testified to in the present case.

The Circuit Court of Appeals for the Fourth Circuit has sanctioned the principle that a local usage

may override the narrow channel rule, without apparently even requiring the hardship of the rule or the advantage of the usage to be shown. The following language was adopted by the Court in *The Newport News*, 105 Fed., 389, 392:

> "The libellant seeks to establish a custom, "in case of fog, for steamers to take the "Maryland (or left) side of the channel, in "going from Washington to Alexandria, and "in this way to account for the position of "the Columbia on the eastern, instead of on "the western, side of the Channel at the time "of the collision. That *such a custom*, if it "exists, *may* serve to *supersede the usual "rules of navigation, may be conceded. The "Pavonia*, 26 Fed., 106; *The James Bowen*, "52 Fed., 510."

On the other hand, it is ordinarily held that a local custom modifying the usual rules of navigation, although well established, is ineffectual legally, unless it be reasonable and advantageous.

Occidental S. S. Co. v. *Smith*, 74 Fed., 261, 268.

The Acilia, 120 Fed., 455, 458.

III.

The District Judge was gravely in error in holding that the mere presence of the Narragansett and her tow on the westerly side of the waterway in question, was a fault contributing to the collision.

We feel every confidence that the course pursued by the Narragansett from Staten Island toward the Hudson River on the westerly side of the waterway between those two points, will be *fully justified* by

this Court as not in conflict with the narrow channel rule. For we think the two foregoing points are supported by the decisive weight of authority and of reason.

But there is another ground upon which the libellant was entitled to a decree for full damages, so clear as to be almost *indisputable.* Indeed, this right is supported by such unanimity of authority that it is difficult to avoid the inference that the point, although argued and briefed, was overlooked by the learned District Judge at the time of making his decision.

The Narragansett is entitled to exoneration from any share in the legal responsibility for the collision, even though she were navigating on the westerly side of the waterway in violation of the narrow channel rule, because, in view of the great distance at which the vessels were visible to each other, there would not have been the slightest difficulty on the part of La Bretagne in avoiding the Narragansett and her tow, upon the facts as found by the District Judge, had the steamer exercised even a slight degree of care towards the Narragansett.

The improper position of the Narragansett was only a *condition*, known to La Bretagne and with reference to which, it was the legal obligation of the latter to navigate. Failing by the grossest negligence to avoid the Narragansett's tow, she cannot invoke the antecedent fault of the Narragansett (if fault there was) as a ground for shifting part of the responsibility from herself, for it was to her negligence alone that the collision was proximately due.

The morning of the collision was bright and clear. It was broad daylight, between 10 and 11 A. M. There was no congestion of craft in the harbor, nor was there anything to prevent vessels from seeing each other ten or a dozen miles away.

Although La Bretagne pleads that she was "crowded" (32), no witness claims that there were

vessels enough ahead of La Bretagne in any direction to make it difficult for her to pass between them. Pilot Sullivan has not a word to say on the subject and the only allusion to the matter is Capt. Poncelet's statement that the waters were "more free on the port hand" of La Bretagne (Report, 738).

The captain of tug *N. Y. C. No. 10* saw the colliding vessels from the time he left Erie Basin, over a mile away (Gallagher, 171).

The captain of the *Tice* from a position slightly north of Robbins Reef watched La Bretagne come out of the Hudson River past the Battery, nearly three miles away (Coleman 108) and the *Tice* was noticed by those on the steamer two miles away (Roch 531).

On the part of the steamer, it is admitted that "the weather was very clear and one could see perfectly well" (Morice 717).

The course adopted by the Narragansett was perfectly obvious and apparent. The reason for its adoption was equally apparent to pilot Sullivan, if not to Captain Poncelet; the former, at least, must be presumed to be familiar with the undisputed custom testified to by Captain Clarke (100, 102). The pilot, therefore, must have recognized the Narragansett as a vessel which was avoiding and would continue to avoid the adverse tidal current by keeping to the west.

The record shows that La Bretagne, in fact, had early notice of the presence and movements of the Narragansett.

From a point substantially abreast of Ellis Island, according to Pilot Sullivan (211), he saw the Narragansett, which must then have been below Buoy No. 15 (Clarke, 62), 1½ miles away. Captain Poncelet apparently began to notice the Narragansett a mile away (Poncelet, 345), as did his subordinates (Roch, 531; Morice, 597; Le Guillon, 655).

It is, therefore, clear that if (as the District Judge

nas found on an overwhelming preponderance of testimony) the Narragansett and La Bretagne, when they came within manœuvering distance of each other, were in a starboard to starboard situation with reference to each other, the Narragansett, navigating on the westerly side of the channel, was no greater hindrance or menace to La Bretagne than she would have been on the easterly side of the channel.

All that the steamer was required to do in order to avoid collision was to follow the most elementary principle of navigation, that of preserving until the vessels have passed abaft the beam of each other, a starboard to starboard situation that has existed when the vessels have come within manœuvering radius of each other.

The Mexico, 78 Fed., 653, 655.

The obligation of navigating in conformity with this principle (too obvious to require express statute) has been expressly recognized in the second sentence of Inland Rule I of Article 18; although the duty of exchanging whistle signals is confined to cases where the approach is so nearly end on as to resemble a head and head situation.

The Atlantic City, 143 Fed., 451, 455.

The principle in Davies *v.* Mann.

It has not been doubted since the case of *Davies* vs. *Mann*, 10 M. & W. 546, that a plaintiff in common law cases is entitled to full recovery notwithstanding his having negligently brought himself into an improper position in the defendant's path, if the circumstances show that the defendant had adequate opportunity to conduct himself with reference to plaintiff's improper position in such manner as to avoid injury to the latter.

Balt. & O. R. Co. v. *Hellenthal*, 88 Fed., 116.

Turnbull v. *New Orleans R. Co.*, 120 Fed., 783.

The principle was stated as follows in *Grand Trunk Ry. Co.* vs. *Ives*, 144 U. S., 408, 429:

> "The contributory negligence of the party "injured will not defeat the action if it be "shown that the defendant might by the "exercise of reasonable care and prudence "have avoided the consequences of the in- "jured party's negligence."

Thus one who negligently placed his foot between piling at the edge of a wharf which was being approached by a steamer, was held entitled to full recovery for injuries to his foot due to the breaking of the planks of the wharf by reason of a negligently violent contact by the steamer. *Inland Coasting Co.* vs. *Tolson*, 139 U. S., 551, 558.

And so where a vessel negligently stranded and is improperly obstructing a part of the navigable channel, such negligence cannot, for the purpose of an apportionment, be taken advantage of by another vessel which, in attempting to pass, negligently sheers and injures the stranded vessel.

Austin vs. *N. J. Steamboat Co.*, 43 N. Y., 75, 82.

In a jurisdiction in which the negligence of parents in caring for and protecting their children is imputed to the latter (*Thurber* v. *Harlem R. Co.*, 60 N. Y., 326, 333), it is nevertheless well settled that the negligent presence of a child on a railway track will not affect its right to recover for injuries, if ordinary care on the part of the engine driver could have averted the consequences of the child's improper position:

> "In such a case neither the fact that the " plaintiff was wrongfully on the defendant's " railroad nor the fact that his own negli- " gence or that of his parents contributed to " the injury constitutes a bar to a recovery."

Kenyon vs. *N. Y. Central Co.*, 5 Hun, 479, 480; 76 N. Y., 670.

SAME PRINCIPLE APPLICABLE IN ADMIRALTY.

Under similar circumstances, it is settled that a libellant in admiralty is equally entitled to be exonerated from the charge of contributory negligence.

Dr. Lushington, in charging the Trinity Masters in an admiralty case, said:

> " It is, I apprehend, the bounden duty of " the vessel under weigh, whether the vessel " at anchor be properly or improperly an- " chored, to avoid, if it be possible with " safety to herself, any collision whatever. " This is not only the doctrine of the mari- " time law, but it is also the doctrine of the " common law, with respect to carriages on " the high road."
>
> *The Batavier*, 2 W. Rob., 407.

This language has been substantially adopted by Mr. Justice Clifford in the case of *The Clarita and The Clara*, 23 Wall., 1, 14.

In *Cayzer* vs. *Carron Co.*, 9 App. Cas., 873, it was argued by Sir Richard Webster that the doctrine in *Davies* vs. *Mann* is not applicable in the Admiralty because of its peculiar rule of apportionment of damages in the event of concurring faults (at p. 875). But the House of Lords held otherwise. Lord Blackburn said:

> " There was no attempt to say that any " authorities shew that the rules of the Court " of Admiralty and the rules of a Court of " Law as to what amounts to being a fault " occasioning the accident differ in the slight- " est degree. The nature of the thing, of " course, requires that in applying those rules " you should look to what the nature of the " accident is and to what the neglect is. If " it is two ships, they are to be governed by " the same rules of law and of evidence as if " it were two carts in the street " (at p. 882).

The case dealt with the consequences of the infraction of a Thames River regulation having the force of a statute. This regulation required steam

vessels navigating against the tide before rounding Blackwall Point to ease their engines and wait until vessels bound in the opposite direction had passed. The steamer Clan Sinclair, without easing, started to round the bend and, while still turning, collided with the steamer Margaret. The latter was primarily in fault for maintaining an excessive speed in a too congested locality. But although it was conceded that the Margaret could not so easily pass the Clan Sinclair at the bend as in the straight part of the river before the latter had come to the bend, the Court nevertheless held unanimously that the failure of the steamship Clan Sinclair to ease her engines before coming to the bend as required by the regulation was not proximately a contributing cause of the collision.

In a recent case before the Circuit Court of Appeals for the Third Circuit, a man attempted by means of a skiff to row across the icy Delaware River. Although a tug was coming and it would have been the part of prudence to wait until the tug passed, he persisted. He was run down, the skiff sunk and he was drowned. A direction of a verdict for the defendant on the ground of contributory negligence was held error. Judge Acheson says:

> " Although a plaintiff who sues for an in-
> " jury inflicted by the defendant might by
> " the observance of proper care have avoided
> " exposing himself to the injury, yet this
> " will not prevent him recovering damages
> " from the defendant if the latter discover
> " or by the exercise of ordinary care might
> " have discovered the exposed situation of
> " the plaintiff in time by the exercise of or-
> " dinary care and diligence to have averted
> " the effect of the plaintiff's negligence and
> " to have avoided the injury which hap-
> " pened."

Klutt vs. *Phila. & R. Co.*, 142 Fed., 394, 397.

S. P., *Weisshar* v. *Kimball S. S. Co.*, 128 Fed., 397.

APPORTIONMENT UNJUSTIFIED, NOTWITHSTANDING IMPROPER ANCHORAGE.

On the same principle, vessels improperly anchored in navigable channels are regularly exonerated from liability for the resulting collision where the latter could with ordinary care have been avoided by the moving vessel.

The Clarita and The Clara (*supra*).
The Richmond, 63 Fed., 1020, 1022.
The Municipal, 108 Fed., 895.
Wilhelmson vs. *Ludlow*, 79 Fed., 979.
Knowlton vs. *Sanford*, 32 Maine, 148.

In the case of *The Richmond*, this Court had under consideration the legal effect of the improper anchorage of a steamer in the Hudson River for which she had been condemned by the District Court. This Court said:

> "Although the Richmond was in fault be-
> "cause she was occupying a position in
> "breach of the regulations respecting the
> "anchorage ground, we are not satisfied that
> "this fault was, under the circumstances, a
> "contributory cause of the collision. If, not-
> "withstanding the fault of the Richmond,
> "the Heipershausen could have avoided the
> "collision by exercising ordinary care, the
> "Richmond ought not to be condemned.
> "Under such circumstances the fault of the
> "Richmond would not be a proximate cause
> "of the loss."

TECHNICAL VIOLATION OF EAST RIVER STATUTE DOES NOT WARRANT CONDEMNATION.

The alleged infraction of the regulations complained of in the present case was in failing to keep on the starboard side of an alleged narrow channel. If, instead of requiring the Narrangansett to keep to the *side*, the statute had required the Narragansett to keep to the *center* of the channel and La Bretagne had sought to hold the Narragansett partly in fault for keeping to the side of the channel,

it is obvious the principal would have been precisely the same.

The latter question has been frequently and uniformly solved by the courts in the case of violations of the New York State statute requiring vessels navigating the East River to keep in the center thereof:

The W. N. Bavier (C. C. A.), 153 Fed., 970, 972.
The Clara (C. C. A.), 55 Fed., 1021, 1023.
The Fanita, 8 Benedict, 11; 14 Blatch., 545.
The Frederick M. Wilson, 7 Benedict, 367.
The Maryland, 19 Fed., 551, 556.
The Britannia, 34 Fed., 546, 557.
The Senator D. C. Chase, 46 Fed., 874, 876.
The Titan, 44 Fed., 510, 512.
The Columbia, 29 Fed., 716, 719.
The Emperor, 46 Fed., 143.

The principle regularly applied in such cases, and fully as applicable in the present case, was well stated in *The Columbia, supra*, as follows:

> "Where there is ample time and space "and opportunity for navigation and for "avoiding each other, such prior faults" (as the violation of the East River statute) "are "regarded as remote and not proximate "causes, and hence immaterial. In many "other cases, where the position of the boat "unlawfully navigating near the slips and "piers has created embarrassment in the "movement of either so as to be in direct "connection with the collision as one of its "proximate causes, the violation of the statute "has been uniformally treated as a legal "fault." (Citing cases.)

Here it would be absurd in the extreme to contend that the mere *presence* of the Narragansett on

the westerly side of the channel could possibly have been in any sense an embarrassment to La Bretagne; for the Narragansett's perfectly straight course was visible to La Bretagne during two miles of their mutual approach, and she was one of only *three* vessels, so far as the record shows, between La Bretagne and the Narrows in a water-way *more than twice as wide* as the East River. Not a witness for La Bretagne claims to have been embarrassed by any congestion of vessels.

The Portia.

The decision of this Court in the case of *The Portia*, 64 Fed. Rep., 811, is an important expression of the principle applicable here. The steamtugs S. L. Crosby and Townsend, towing seven loaded canalboats, were proceeding up the East River toward Hell Gate with a flood tide. They were somewhat on the easterly side of the river and were heading over toward the New York shore in order to enter the Harlem River. In this position the steamship Portia rounded Horn's Hook while on the New York side of the river, heading down toward the Battery. The Portia was not only on her proper side of the river under Article 25 of the Rules (if that article be applicable), but had the right of way under Article 19, as the vessels were on crossing courses. In this situation, the Portia blew a signal of one blast and received an answer of one blast. The tugs wrongfully kept on into the waters of the New York side of the river and a collision occurred which could, at the last, have been averted by the Portia had she reversed her engines somewhat earlier. The wrongful position of the tugs in the Portia's waters, and in violation of the whistle-agreement, was regarded as immaterial by the Court and the Portia alone was condemned. Says Judge Wallace:

> " By a statute of this state applicable to the
> " waters of the East River, it was obligatory

" upon the Portia and the steam tugs, meeting as they were, to pass one another port to port by going on their respective starboard sides of the river. Although the tugs were embarrased by a heavy tow, and were going with the swing of the tide, the Portia had no reason to apprehend, when she first discovered them, that they were incapable of controlling their own navigation. They were well on the easterly side of mid-river. . . . As the vessels approached each other the tugs steadily encroached upon the waters available to the Portia until the time came when the Portia had a right to believe that it was no longer safe for her to persist in the course agreed upon. . . . It would have been manifestly imprudent for the Portia to have adhered to her original purpose of passing the tugs and tow port to port. It is entirely plain that this situation was brought about by the failure of the steamtugs to perform their obligations. . . . As a consequence of their remissness, the Portia was placed in a hazardous emergency and the situation involved risk of collision. . . . When the collision took place the Townsend was quite close to the docks on the New York shore, and the situation of the tow at that time proves that it would have been impossible for the Portia to have passed on the port side if she had kept on her original course, instead of changing it to port.

" Notwithstanding all the extenuating circumstances, the Portia must be held in fault for the collision. When the situation had become so critical that she was obliged to deviate from the course which had been agreed upon between the vessels, it was her imperative duty under Rule 18 to slacken speed, or, if necessary, to stop and reverse" (precisely what the Narragansett in fact did in the present case) ". . . When, instead of obeying the rule of navigation by stopping or reversing, the Portia concluded to proceed by altering her course to port, she took that course at her own risk. Although she subsequently reversed, and did what was in her power to

" avoid collision, her fault in disobeying the
" rule was fatal. The fault on the part of
" the tugs, though gross and inexcusable, was
" not a proximate cause of the collision. An
" antecedent act of negligence is remote
" when, notwithstanding, the other vessel,
" by the exercise of ordinary care, can avoid
" a collision; and if, notwithstanding the
" fault of the tugs, the Portia could have
" avoided the collision by obeying the rule,
" which under the circumstances was impera-
" tive, she alone must be condemned."

TECHNICAL VIOLATION OF NARROW CHANNEL RULE ALSO IMMATERIAL LEGALLY.

The same principle under which violations of the East River statute have so often been held immaterial, has also been applied in exonerating from liability vessels that have come into collision while navigating on the wrong side of narrow channels.

In the case of *The Westhall*, 153 Fed., 1010, a tug while navigating down the Elizabeth River in Virginia, on the east or starboard side of the channel, left that side and crossed over to the wrong side of the channel when at a distance of 1 3/8 miles from the steamer Westhall, with which she afterwards collided. She was exonerated from liability, notwithstanding her subsequently navigating near the margin of the (for her) wrong side of the channel. Says Judge Waddill:

" Counsel for the respondent insisted in an
" argument that libellant should not recover
" because the tug and the tow were on the
" wrong side of the channel. Under the cir-
" cumstances of this case, the Court cannot so
" hold even conceding that the present rules
" of navigation as to the right of the road ex-
" isted and that the tug and tow should have
" kept to the eastern side of the channel. The
" Court does not think that on that account
" the libellant should be disentitled to recover
" full damages . . . The fact of being on
" the wrong side of the channel of itself
" would not prevent a recovery in this case as

> " it certainly would not justify the steamship
> " in violating her plain duty of keeping out
> " of the way, having the tug and tow in full
> " sight and being able to do so" (at p. 1016).

In the case of *Andrus* vs. *The Steamboat Saratoga*, 1 Fed., 730, 733, the steamer Saratoga bound down the Hudson River, overtook and collided with a canalboat in tow of a tug. These vessels, as well as the Saratoga, were violating a State statute, similar in substance to the narrow channel rule. Says Judge Choate:

> "The suggestion that the law of the State
> " required the tow to keep on the western side
> " of the channel is not material in the present
> " case since the tow being in the wrong
> " place, if she was so, would not justify the
> " steamboat in violating her plain duty to
> " keep out of her way, having her in full
> " sight and being able to do so."

A division of damages was therefore denied.

In like manner, it was said in the case of *The Calvin Austin*, 9 Exch., C. R., 160:

> "It was strongly urged that as the Reform
> " was on the port or south side of the channel
> " that must be taken to have contributed to the
> " accident. I think, considering the case prop-
> " erly, it is not right to say that that did
> " contribute to the accident. *It is true that if*
> " *she had not been there, the Calvin Austin*
> " *would not have run into her.* . . .
>
> "The cause of the accident was that the
> " Calvin Austin, knowing that the Reform
> " was coming up on the south side of the
> " channel, without giving any signals what-
> " ever and violating Rule 18 entirely, sud-
> " denly, and as I said without notice to the
> " Van Allens Bougton" (a schooner) " that
> " was in front of her, ported her helm and
> " attempted to pass down on the starboard
> " side of the Van Allens Boughton, although
> " previously to that at least two of the offi-
> " cers of the Calvin Austin had seen the Re-
> " form coming up on that side" (pp. 185,
> " 186, 187).

See also *The Dictator*, 169 Fed., 789.

The purpose of the narrow channel rule is to bring vessels into manœuvring distance of each other in such a situation that the subsequent observance of those other rules, *which prescribe the movements of vessels in the presence of each other*, will enable them readily to avoid each other.

The Rhondda, 8 App. Cas., 549, 554.
The Leverington, 11 P. D., 117, 119.

If they do in fact reach such a situation at the time in question, it matters not whether they have previously complied with the narrow channel rule or not.

The cases in which violations of the narrow channel rule *have* been deemed material are principally those in which a vessel, relying upon finding the starboard side of the channel in front of her free from approaching steamers, has been unable to discover her mistake seasonably because of fog,

The Yarmouth, 100 Fed., 667;
The Newport News, 105 Fed., 389;
The Spearman, 10 App. Cas., 276;

or because of intervening banks or obstructions in the bend of the channel,

The Victory, 168 U. S., 410;
The Rhondda, 8 App. Cas., 549;

or because of intervening vessels,

The Calvin Austin, 9 Exch. C. R., 160;

or in which the steamer violating the narrow channel rule, occupying with a tow a great breadth of waters or surrounded by a congestion of traffic, has, in darkness or mist, blocked the other steamer's half of the channel, seriously embarrassed her navigation, and made disaster avoidable, if at all, only by the greatest care and skill,

The Benjamin Franklin, 145 Fed., 13;

or in which the navigation of the steamer charged with violation of the narrow channel rule has been such as properly to indicate to the other vessel that the latter's half of the channel would be freed for her before she should reach the point of intersection of their courses, but in which the reliance of the latter upon such indication proved, when too late, to be ill founded.

The Sea King, 114 Fed., 535.

To be material, the presence of the vessel infringing the narrow channel rule "must in some way "contribute to the happening of the collision, as, "for example, when a vessel in forbidden water "has been concealed by fog or by some other vessel "and suddenly appears where she was not to be ex- "pected, or where the forbidden water is so re- "stricted, or already so incumbered with other "craft, that her presence embarrasses the naviga- "tion of the other vessel."

The Benjamin Franklin, 145 Fed., 13, 17.

Although in many cases like *The Bee*, 138 Fed., 303, the duty of vessels with reference to the narrow channel rule is discussed where the faults proximately causing the collision did not relate to any violation of the narrow channel rule; it will nevertheless be found that wherever a vessel has been condemned for violation of the rule, the other vessel must have been prejudiced (to adopt the language of this Court in *L. I. Co.* v. *Killien*, 67 Fed., 365, 367), because of her movements having been embarrassed by the presence of the offending vessel or because of her having been denied the opportunity of taking some precaution owing to want of seasonable knowledge that the offending vessel would be there.

PRESENCE IN THE WRONG PLACE NOT ENOUGH.

The only reason assigned by the District Judge for holding the Narragansett in fault for this colli-

sion is that if she had been on the easterly side of the channel, La Bretagne which was navigating on the westerly side of the center, could not have collided with her (Opinion, 791).

We should be willing to concede (were it material) that if the Narragansett had been on the easterly side of the channel, La Bretagne would not, by a starboard helm sheer, have committed a monumental blunder analogous to that of her actual port helm sheer. Nevertheless, with the greatest respect to the learned District Judge, we are unable to see in his words (791) anything better than a *post hoc, propter hoc* fallacy.

After a careful search among the authorities, we have been unable to find a single other decision in which the *mere presence* of a vessel in the wrong place has been expressly made the ground of liability or of dividing the damages.

Even the same Judge had apparently declined to apply the same method of reasoning in another case decided about the same time: *The Kentucky*, 148 Fed., 500, 504.

The argument successfully invoked before the District Judge in this case is essentially the same as that resorted to in the case of the *The Umbria*, 166 U. S., 404, 420, where it was sought to hold the Iberia in fault for a fog collision because if she had stopped or reversed on hearing the Umbria's whistles the result would have been to leave the Umbria's path unobstructed. Says Mr. Justice Brown:

> " It is true that if she " (the Iberia) " had
> " stopped promptly she might not have
> " reached the point where the courses of the
> " two steamers intersected; but it is equally
> " true that if she had been going at a much
> " greater speed than she was she would have
> " passed the point of intersection before the
> " Umbria reached it, manifestly this is not
> " the proper test."

The identical argument which was effectual in the present case in bringing the District Judge to his conclusion in favor of a division of damages, was used ineffectually in the cases of *Cayzer* vs. *Carron Co.*, of *The Fanita* and of *The Britannia* (the decision last mentioned being approved by this Court in *The Clara*).

In *Cayzer* vs. *Carron Co.*, 9 App. Cas., 873, 883, Lord Blackburn says:

> "Then it is said that the collision was owing "to the Clan Sinclair being where it was. "Undoubtedly, in one sense that is so. *If* "*the Clan Sinclair had been some hundred* "*yards higher up the river*, the fact which "made it a matter of rashness for the Mar- "garet to run where it did run, would not "have existed, but that is not a sufficient "ground for saying that the fact of the Clan "Sinclair being there was the cause of the "accident. The Clan Sinclair would not have "been there at the time it was there, if it had "not been that that vessel did not ease and "wait so soon, perhaps, as it ought to have "done; but that was not the cause of the "accident, but that the Margaret, knowing "where the Clan Sinclair was, attempted to "pass it between it and the Zephyr, where "there was not sufficient room."

In *The Fanita*, 8 Benedict, 11, Mr. Justice Blatchford, then District Judge, says:

> "The libel alleges that the propeller was in "fault in not keeping in the middle of the "river and in running so close to the docks. "The collision was not in any manner due to "the fact that the propeller was not further "off from the docks or was not in the middle "of the river or was too close to the docks "except, as it may be said, that, as the "schooner was not in the middle of the river, "*the collision would not have happened if* "*the propeller had been in the middle of the* "*river*. There was abundant room for the "propeller to clear the schooner between the "schooner and the New York docks without "crowding or embarrassing the schooner if "the schooner had kept her course."

Two controlling decisions of this Court.

We have reserved for our last authorities under this point two decisions of this Court which we believe to be decisive of the present appeal. Although they were made with reference to the East River statute and not the narrow channel statute, the principle involved in them is, we submit, identical.

In the case of the *Long Island R. R. Co.* vs. *Killien*, 67 Fed. Rep., 365, the ferryboat Garden City, proceeding down the East River toward the Battery, and without the excuse of any custom, violated the State statute requiring vessels to navigate as near as possible to the center of the East River. The collision was due to an improper sheer on the part of the tug that was being overtaken by the ferryboat. Says Judge Wallace, speaking for this Court:

> "We fully agree with the District Judge
> " that the tug was in fault for the collision.
> " We are unable, however, to agree with his
> " conclusion that the ferryboat was also in
> " fault. . . . The sheer of the tug was
> " observed, and, as soon as the master and
> " wheelsman of the Garden City saw that
> " there was danger of collision, they reversed
> " her engines and starboarded her wheel.
> " Doubtless the Garden City was not being
> " navigated as near as possible in the center
> " of the river, as the terms of the State stat-
> " ute, applicable to the East River, required;
> " but this, as we have frequently had occa-
> " sion to decide, should not condemn her for
> " the consequences of a collision, which, not-
> " withstanding her presence there, would not
> " have occurred if the other vessel had exer-
> " cised ordinary care to avoid it. Only such
> " vessels can invoke the violation of the stat-
> " ute as an actionable fault, as have been
> " prejudiced by it, either because their own
> " movements have been embarrased by the
> " presence of the offending vessel, or because
> " they have omitted to take some precaution
> " in ignorance of her presence, which they
> " might otherwise have avoided danger by
> " adopting."

In *The Clara*, 55 Fed., 1021, which is the other case referred to, the tug Clara and the steamer Reliance were approaching in a port to port situation close to the New York shore off Corlear's Hook, the Reliance nearer the shore than the Clara. The Reliance, with the assistance of the current, turned in a direction across the bow of the Clara toward the middle of the river, bringing about the collision. This Court reversed a decision of the District Court dividing the damages. Said this Court:

> " The more difficult question in the case is " whether the Clara is also to be deemed in " fault for the collision. The only fault which " can be imputed to her is that of navigating " too near the New York shore, in disregard " of the State statue which required her to be " navigated as near as possible in the center of " the river. But she is not to be condemned if " her fault was a remote, and not a proximate " cause of the disaster; and the real question " as regards her liability is whether her fault " was not one of that description. Although " she was improperly beyond mid-river, she " was not so near the shore as to embarrass " the Reliance in rounding the Hook if the " latter had been properly navigated. We do " not overlook the rule that it is to be pre- " sumed against a vessel which at the time of " a collision is in violation of a statutory regu- " lation intended to prevent collisions that " her fault was at least a contributory cause " of the disaster, and that the burden rests " upon her of showing not merely that it " probably was not one of the causes, but " that, under the circumstances, it unques- " tionably was not. But, as was said in *The* " *Britannia*, 34 Fed. Rep., 557, by the learned " district judge who decided the present cause, " in a case where a breach of the same statute " was under consideration:
>
> ' The mere transgression of such a statute ' will not make the vessel liable where the ' disobedience of it did not contribute to the ' collision; and, inasmuch as only the proxi- ' mate causes of collision are deemed ma- ' terial, *the mere fact that the vessel is on*

'*the wrong side of the river does not make* '*her liable* if there was ample time and 'space for the vessels to avoid each other 'by the use of ordinary care. In such cases 'the cause of the collision is deemed not 'the simple presence of the vessel in one 'part of the river, rather than in another 'part, but the bad navigation of the vessel 'that, having ample time and space, might 'easily have avoided the collision, but did 'not do so.'

"A finding that negligence, or an act not "amounting to a wanton wrong, is the proxi- "mate cause of an injury, is not warranted "unless it appear that the injury was the "natural and probable consequence of the "negligence or wrongful act, and that it "ought to have been foreseen in the light of "the attending circumstances. The Clara "was under no obligation to anticipate that "the Reliance would not see her, would take "a course across the course of the Clara, and "then, instead of backing and reversing, "would attempt to make the hazardous "movement which resulted in the collision. "We conclude that the Reliance was wholly "responsible for the collision, and that the "Clara's fault did not contribute to it."

This language was precisely applicable to the present case.

It was certainly not a natural or a probable consequence of the Narragansett's laying a course on the westerly side of this waterway (and, indeed, had no causal connection with it whatever) that La Bretagne, after approaching starboard to starboard, should wrongfully sheer under a port helm and run her down. Equally was the Narragansett under no obligation to anticipate that La Bretagne, having turned slightly and properly under a port helm to bring the tug Tice on her port bow, would improperly and with the grossest negligence continue and increase such sheer and finally resort to the foolhardy expedient of attempting to cross the Narragansett's bow.

IV.

The record overwhelmingly supports the finding of the District Judge that the vessels were in positions to pass safely starboard to starboard and that the collision was produced by a change on the part of La Bretagne to the starboard.

(A) The finding of the District Judge above referred to is plain and unequivocal (Opinion, 782).

It was reached with the greatest care. The clear conviction of the Judge to this effect which was produced upon his mind by the demeanor of the various witnesses upon the witness stand, did not lead to a decision from his pen until after he had, with painstaking care, scrutinized the minutes of the testimony (Opinion, 782).

In the presence of the District Judge were examined the master and the pilot of La Bretagne. the master and mate of the Narragansett and the masters of five independent tugs already referred to. The only witnesses whose testimony was submitted to him by deposition were the third officer of La Bretagne and three seamen who were on the steamer's bridge at the time of the collision. In the testimony of the latter four witnesses is to be found only a partial, or even fragmentary, account of the events preceding the collision, and, as they were wholly without responsibility except to use the steering wheel and the engine-room speaking tube, and were influenced, as usual, by feelings of loyalty to their own vessel (Morice, 650; Le Louarn, 710; Le Guillon, 679, 681; *The John Martin*, 56 Fed., 729, 730), their testimony is, of course, relatively unimportant.

It is the clearest kind of case for the application of the doctrine which has uniformly been recognized by this Court that the findings of fact of the Dis-

trict Judge upon conflicting evidence will not, in the absence of a clear error, be set aside where the trial Judge saw and heard the important witnesses and had an opportunity of weighing their intelligence and candor:

The W. G. Mason, 142 Fed., 913, 914.
The Ganoga, 135 Fed., 747.
The Kaiser Wilhelm der Grosse, 145 Fed., 623, 624.

Similar rulings in all of the other circuits are so numerous that it is scarcely worth while to cite them. It may be noted, however, that the principle is by no means confined to cases where even a majority of the witnesses were examined in the presence of the District Judge.

Perriam vs. *Pacific Coast Co.*, 133 Fed., 140, 144.
The Charles Hebbard, 56 Fed., 315, 320.
Baker-Whiteley Co. vs. *Neptune Nav. Co.*, 120 Fed., 247, 249.

(**B**) But we are confident that if this Court shall weigh the evidence independently of the findings below, it will be found to support them so strongly that findings of the opposite character could not have been sustained in this Court.

1. While the numerical preponderance is with the Narragansett, it is not upon that feature that we rely.

The Islander, 152 Fed., 385, 388.

It is upon the disinterestedness of nearly all of libellant's witnesses (contrasted with the inability of the steamer's New York agents and attorneys to find *a single disinterested witness* to support its story), upon the excellent opportunity for observation of the important conditions and events possessed by these witnesses, upon the discrediting conflict between the

claimant's only two important witnesses, and upon the superior intrinsic probability of libellant's story that we rely.

The identity of those who saw the collision was made known to the litigants through an investigation of the U. S. Local Inspectors almost immediately after the accident. The libellant accordingly subpœnaed more witnesses from outside vessels upon the trial than it seemed reasonable to examine.

Upon the objection of La Bretagne and at the suggestion of the District Judge (195, 197), the Narragansett forebore to examine more than the five tug masters already referred to. Captain Eneas of the tug Burke, as well as the subordinate officers of several of the tugs, was left without examination. This situation was understood by the District Judge (Opinion, 778), and by the senior counsel for the French Line, but has not been reported in the stenographer's minutes. The fact that all of claimant's servants, except one who could not be traced, were presented for cross-examination (which was not taken advantage of) duly appears, however, in the Record (195–196).

La Bretagne, on the other hand, did not produce for examination the assistant captain, or any of the seamen on the forecastle head (Roch, 582), or any one of those on duty in the engine room.

2. It appears from the testimony that the actors in the drama which preceded the collision were not only La Bretagne and the Narragansett, but also the tug *Nettie Tice*. The stories from the decks of these three vessels will therefore be stated with some care, followed by references to the remaining, which, in view of the convincing and painstaking opinion and findings of the District Judge, need not be elaborate.

Following is the story of the navigating officer of the Narragansett, Captain Edward C. Clarke,

using his own language as nearly as is practicable, consistently with reducing it to a narrative:

> I have been a steamboat pilot and captain for 23 or 24 years; about 13 or 14 years in the employ of the Baltimore and Ohio Railroad (43). The Narragansett has a speed of about 10 knots light (45). We were making, with our tow of two carfloats, about five statute miles an hour. Float "No. 160," 300 feet long, with 14 cars, was in tow on the starboard side. Float "No. 67," 210 feet long, with eight cars was on the port side. The cars were all loaded. In the pilothouse, I stood 12 inches higher than the top of the cars and could see over them easily (46–48).
>
> We were steering N. E. by N. before the collision, following the edge of the anchorage grounds to the west of the channel, getting all of the slack water we could; it was the last of the flood tide. It was a clear day; wind, what there was of it, about S. S. W. (48–50).
>
> It was at about 10.35 A. M. (60), when we were abreast of or a little below buoy No. 15, that I took *special* notice of La Bretagne, then near Castle William, a little below the Fort, coming to the southward (62). She was in the center of the channel, and I was on the extreme westerly edge. The vessels would have shown their green lights to each other, had it been night (64). At a distance of about three or four ship's lengths, the steamer blew the first whistle that I took notice of and began to sheer (65).
>
> We were going about five miles an hour, judging from the distance covered. The tug *Tice* was on a parallel course, coming up the Bay on our starboard-quarter, 700 or 800 feet distant (66–69). Up to the time La Bretagne sounded her whistle, there was no danger; the vessels were going along serenely. The steamer immediately afterwards sheered towards us. When I saw how rank his sheer was becoming, I blew an alarm whistle and rang bells to stop and back (69–70). The ship kept on coming. I knew the vessels couldn't well get away from each other. I called to my men to get off.

The steamer must have backed and lost considerable speed, and so did we, but not enough to keep us from coming together. At the time of the collision we didn't have much headway, but I don't think we had it all checked. The French steamer had two or three knots speed at that time, very likely (72, 73).

The blow was hard enough to cut into the float about 10 feet. It parted and lost our lines and tore the floats adrift. It struck the float on the starboard side, about a hundred feet from the starboard bow of the float (74). Our reversed engines naturally pulled our bow a little more to westward than we were originally (p. 11), on account of the starboard float being heavier. I think in the interval between reversing our engines and the time of collision I must have turned a point and a half, something like that, possibly two points. I think the French Liner, after blowing one whistle, turned four or five points up to the collision. The angle of collision was about 45 degrees (75–77).

If the French liner had started in season to pass to the westward of my course it would not have been a proper maœuvre for any sane person to make with a vessel of that size on account of vessels anchored to the westward, there wasn't room. We had just passed the barge Moonbeam about 150 feet away at anchor, and the steamer Rushington a quarter of a mile astern, heading about N. W. with the slack water, and several other barges. Our course was on the edge of the parallel (straight) line of buoys, and they were 150 or 200 feet to the westward of us (78–80).

While the French Liner was backing and after the collision I thought that she was trimmed by the head. This would make her steer badly. I accounted for her rank sheer in that way (83, 85).

Immediately the stem of the steamer struck the float, the cars on the port side of the same float started to run overboard. All on that side but one (I think six), and one car on the starboard side of the float ran overboard. The deck lines between the floats were all broken. The tug still stayed on the port side

of the float that was struck. Her backing naturally backed the float around the port bow of the steamer until she cleared; the tug made a complete circle (86).

The stage of the tide was after high water; it was high water slack (95). The ebb tide first runs out of the East River and crosses the channel coming down to westward and south-westward after highwater. At that time, when it is ebb out of the East River, it is still running flood up the North River (96–98).

Where a tug is towing a heavy float or a heavy tow from Staten Island up to the North River on the first of the ebb tide (100), it is the custom among steamboatmen in New York harbor to come up the middle of the Bay all the way up (101) slightly to the westward of the center of the channel, which would make one pretty nearly out in the middle of the Bay. The course we were actually following prior to the time of the collision was the customary course at that stage of the tide (102).

There was no stationed look-out on top of the cars on the float (506); a stationed look-out is not customary among seamen and harbormen in New York South of Castle William excepting in thick weather and at night (507–512).

Following is the story of Captain Michael J. Coleman of the tug *Tice*, reduced in like manner, to a narrative:

I have been a tugboat captain 22 years. My tug was towing three coal-laden canalboats between Elizabethport, N. J., and Jersey City (106). I towed two of them on my port side, and one on my starboard side. The Narragansett and her carfloats passed me on my port side between Robins Reef and Oyster Island; our courses were about parallel at the time (107).

When astern of the Narragansett I noticed La Bretagne coming out of the mouth of the North River. I blew a signal of one blast to the French Liner (108). This was when the Narragansett was on my port bow, about a

h usand feet ahead of me, and the French Liner *directly head and head* as regards my vessel. My course at that time was still parallel with that of the Narragansett, the latter navigating on the western edge of the channel, close to anchorage ground. I judged my course and that of the Narragansett were separated by a thousand feet (110). At the time of my signal to the French Liner, I would have seen both her sidelights, had it been night, and she would have seen both of mine. Within a few seconds I got a reply of one whistle from the French Liner. At the time of this exchange of whistles, the relative courses of the Narragansett and of the French Liner would be broad starboard to starboard. There was no danger as between them, and no necessity to blow whistles.

The steamer kept coming for me for a few seconds (112), probably one length, and then sheered to westward. I had an opportunity to see. She kept on coming to the starboard until there was about to be a collision, and I heard Captain Clarke sounding danger-signals and also the French Liner whistles. I noticed that the Narragansett backed and also that the French Liner backed and kept going to the starboard until they crashed. I saw the Narragansett reverse immediately after she whistled (115).

At the time of the collision the Narragansett was about still, I should think from the position I was in. She hadn't much headway, if any. The French boat was coming along pretty good. Those on the Narragansett could overlook the loaded cars all right (116).

From Captain Coleman's position, *exactly in line* with the French steamer, there could be no mistake about the relative positions of La Bretagne and the Naragansett, being really starboard to starboard.

Libellant's version of the collision *must* be true, unless Captain Coleman of the *Tice* deliberately perjured himself. But the District Judge, who listened to him, believed him.

The tug *Brinton*, from Gowanus, heading for the corner of the anchorage-ground nearest to the Battery (Knott, 120), passed between the French steamer and the Narragansett, the former opposite Bedloe's Island and the latter about 1,000 feet below Black Tom Buoy S. 2 (122). This would make the Narragansett and La Bretagne slightly under half a mile apart at the time. Those on the *Brinton* were in a position to see whether the vessels in question were on crossing courses or not, *especially at the time of passing exactly between.* Captain Knott says that their starboard sides were presented to each other and each would have seen the green light of the other if it had been night.

> "Q. Were you in a position as you passed
> "between them to be able to tell that accur-
> "ately; could you tell *certainly* as to that?
> "A. Yes, sir" (Knott, 125).

After the *Brinton* passed the last of the anchorage-buoys, he straightened up to northward, and, at the same time, heard one whistle on his starboard quarter (128), the Bretagne being, at the time, on his starboard bow (129). This must have been the tug *Tice*, which he noticed below the Narragansett (127). The French Liner was then heard to blow one whistle in reply (131) to the *Tice* and an alarm was given by the tug behind the *Brinton*, which was the Narragansett; this alarm being then answered by the French Liner (Knott, 132).

There is no chance for mistake about this corroboration of libellant's story; it cannot be rejected without convicting Captain Knott of deliberate perjury. But the District Judge, who listened to him, believed him.

The tug *Independent*, at the time of the collision, had been passed by the Bretagne (Roberts, 145), and was almost exactly astern of her and 1,000 or 1,200 feet away (146, 147). Captain Roberts on this tug saw the French Liner begin to sheer (149, 151), and was in a position to know positively that the vessels

at this time were starboard to starboard (148). His perspective enabled him to separate the waters which, from the Bretagne, would have a starboard bearing from those which would have a port bearing, and the Narragansett could not present her starboard bow to the Independent without also presenting her starboard bow to the Bretagne.

Nothing but perjury can explain away the testimony of this experienced and unbiased navigator. No such explanation can be suspected or has been suspected by the District Judge.

Equally conclusive is the testimony of Captain Day from the tug *Runyon*, for his course, as the Bretagne and Narragansett were approaching, lay between their respective courses prolonged. Both vessels presenting their starboard sides to him, it follows, as a matter of necessity, that they must present their starboard sides to each other.

Captain Gallagher of the tug *N. Y. C. No. 10*, although probably not much less than 1 1/8 miles (the distance of Erie Basin) from the place of collision, was, nevertheless, able also to see the starboard to starboard approach and La Bretagne's sheer (172).

3. The only two witnesses called by the claimant, who might be expected to have observed closely the events preceding the collision, are the Captain and the pilot. They differ radically in their stories.

The pilot has it that, while on a course converging in toward anchorage-grounds (Sullivan, 270) he saw the "Narragansett" on his port bow, although he "did not look" exactly (273, 274), but certainly presenting her starboard bow to view (280). The tug and floats then altered their course so as to take one parallel with that of the Bretagne calculated to pass to the eastward (283, 284). In this interval, the pilot had slowed the engines (290, 292) and then put them at *full speed* ahead (293). After the tug and float had thus turned well to the eastward away from

the steamer, without any possible cause, they turned back and sheered sharply to the westward across the steamer's bow (294, 295). Then the pilot slowed his engines again (305). When, by means of this sheer, the tug and tow had reached a position directly ahead of the steamer, the pilot reversed his engines (313).

Captain Poncelet, on the other hand, contradicted the pilot's statement that the Narragansett and her carfloats ever showed their ports sides to the steamer. He describes them as always presenting their starboard sides to the steamer; in fact, he never was able to see the hull of the port float or of the Narragansett beyond float No. 160, which was on her starboard side (Poncelet, 374). The Captain asserts that both vessels sheered to the westward, the tug under the starboard helm and the steamer under a port helm; unconscious, apparently, of the fact that he was convicting his steamer of a violation of Articles 19 and 21 of the Inland Rules, which required her (in the situation he claimed) to hold her *course* and speed.

That neither the tug nor float No. 67 on the port side of the tug was seen (Poncelet, 379) beyond the bow of float No. 160, shows how broad on the starboard bow of the float the steamer always was. The sterns of the two carfloats being substantially abreast of each other, it follows, from the dimensions as accurately given by Mr. Morris, that float No. 160 projected 81 feet 4 inches forward of float No. 67; whereas the lines of the port sides of the two floats would be (33 1/2 + 20 1/2 =) 54 feet apart. The least angle, therefore, which the Bretagne could have been on the starboard bow of float No. 160 would be the angle whose tangent is 54 ÷ 81 1/3, that is to say, 32 degrees 46 minutes, or between 2 1/2 and 3 points.

It may also be suggested in this connection, as an explanation of the erroneous and conflicting statements of the Bretagne's witnesses, that, during the approach of the vessels, the Captain and the pilot

were engaged in a controversy as to the navigation of the steamer (Poncelet, 454–462, 472–475; Roch, 535,583).

So vehement did the Captain's remonstrances against the course adopted by the pilot become, that the pilot told him not to get excited (Captain's Report 740; Poncelet 424–433, 390, 393).

4. The probabilities of the situation, it is submitted, are in favor of a starboard to starboard approach.

Captain Clarke's reason for navigating on the western margin of the channel is clear and consistent with the facts. The Bretagne is admitted to have emerged from the North River practically in the center thereof, and to have navigated the channel, at least at first, practically in the center (Morice, 596, 636). There is therefore a very strong initial probability that the vessels would be on starboard to starboard courses. That this continued down almost to the time of the collision, is asserted by all the persons on independent vessels who have been called as witnesses by either side.

That the Narrrgansett and her tows (considered as a whole) presented always their starboard sides to the Bretagne is testified to by every witness from the Bretagne except one (the pilot). There could be no mistake on the part of the Bretagne's witnesses as to which sides were presented to their view. Indeed, Captain Poncelet is explicit to the effect that, although carefully watching the tow, he was unable to see the port float or the tug (except her funnel) until the time of the collision. On the other hand, it is possible to be honestly mistaken as to the direction in which an object is seen when nearly directly ahead. Claimant's witnesses, who desire, of course, to tell as favorable a story for the Bretagne as possible (Morice, 650), place the Narragansett slightly on the port bow, but by *half a point or less than that*, none of them venturing to make the estimate greater. Unless their position were a good

one for observing directions, as, for instance, if they were a little to the port of the keel line of the ship, an object might well be slightly on the starboard bow in fact and yet appear to be on the port bow. One of La Bretagne's witnesses, indeed, states inferentially that the Narragansett, before the steamer turned at first, was half a point on her *starboard* bow (Le Louarn, 702).

Pilot Sullivan's story may be dismissed as grotesquely improbable. It involves believing that the Captain of the Narragansett, having heard and understood the signal of the Bretagne, ported his helm and took up a position port to port with the steamer, and that then, without any other vessel to obstruct his course (for the testimony is explicit on this point), but, apparently, with an insane purpose of running into danger of collision, starboarded again and ran directly across the bows of the Bretagne.

The Narragansett, with a heavy carfloat on either side, although under adequate control, was at best slow and clumsy, not easily turned, and not capable of more than five miles per hour. The Bretagne is a modern steamer of high speed, capable of making 16 1/2 or 17 knots per hour (Poncelet, 437; Roch, 561). Notwithstanding her high speed, she is relatively a small vessel, and, therefore, easily and quickly turned, under Sullivan's *hard aport* order (Poncelet, 451; Morice, 645; Le Guillon, 684, 685; Sullivan, 230), her length being 495 feet between perpendiculars, 508 feet over all (Poncelet, 486), her gross tonnage 6,756 tons, and her net tonnage 3,100 tons (Lloyds Register and Bureau Veritas). Her length and tonnage have been erroneously given by her counsel.

For a sluggish vessel like the Narragansett to make the successive quick turns described by pilot Sullivan would be absolutely impossible; nor had she speed enough to cross over from the easterly to the westerly side of the channel and get into La Bretagne's path while the latter was swinging under a port helm. For her to attempt to cross the course of the

French steamer, as contended by Captain Poncelet and his subordinates, would be very improbable. On the other hand, there is nothing difficult or improbable in the manœuvres of the swift and mobile Bretagne, as described by the Narragansett's witnesses. The mistake she made was explained (but not excused) by the presence of the tug *Tice*, and an unexpectedly great sheer for the helm order given (Roberts, 158), followed by a hard porting of the helm at the pilot's order, the commonest mistake of an impulsive navigator, one which, as Marsden points out (Collisions, Fifth ed., pp. 395, 396), "has been a fruitful source of collision." That the order was not countermanded was due to the excitement, conflict of authority and stubbornness, for which the primary blame must rest upon pilot Sullivan.

V.

La Bretagne was also in fault for not reversing seasonably.

This fault is, indeed, less glaring but not less clear than her negligent change of course.

Swift steamers navigating in important harbors are held to the highest standard of vigilance in watching the movements of other vessels and in checking their headway promptly.

The City of Paris, 9 Wall., 634.

The order to reverse the engines of the Bretagne was not given until she was within about *one length* of the Narragansett and her tow, according to Third Lieutenant Roch (554), who was managing the engine room telegraph. Pilot Sullivan testified substantially to the same effect (313). Captain Poncelet testified that the reversing of engines took

place when the Narragansett was only 200 meters away, or a little more than a ship's length (Poncelet, 485), and yet his ship *can be brought to a dead stop* in the water from full speed by the reversing of the engines *within two of her lengths.* This is not an estimate of the captain, he has actually tried it in the vicinity of Sandy Hook lightship in order to know what to depend upon in manœuvring his ship (Poncelet, 439).

The persuasive testimony of the independent tugs in the vicinity of the collision is that the Bretagne was making at the instant of the collision about two or three knots per hour.

La Bretagne's failure to produce any of her engineers for examination is virtually an admission of fault in not reversing seasonably.

VI.

The collision was not due to any defect of lookout on either vessel.

The collision was due solely to a foolish and impulsive port helm order of Pilot Sullivan, the danger of which, as Capt. Porcelet testified, he recognized at the time.

The vessels saw each other in ample season to take proper measures, and if any fault there was in that lookouts were not stationed in particular places and in that no reports were made by lookouts on either vessel, those circumstances are of no legal materiality (Coleman, 108; Morice, 717).

It is not accurate to represent Capt. Clarke as not having seen La Bretagne at all before he reached Buoy No. 15. He was merely at that point when La Bretagne came within manœuvring distance of him so as to require *special* notice (60).

Even in a serious fog collision case where a long

river steamer had no lookout stationed forward of the vicinity of her pilot house, that fact was deemed of no materiality.

The No. 4, 161 Fed., 847.

See also

The Blue Jacket, 144 U. S., 371, 390.

In the present case it is clear there was nothing for the Narragansett to do other than what was done.

The vessels were on safe starboard to starboard courses and no change of course or other manœuver on the part of the Narragansett was called for until La Bretagne continued her sheer beyond the small degree of turn that would be accounted for by the presence of the tug *Tice* ahead of her. As soon as this happened, it is undisputed that the Narragansett immediately reversed her engines and blew danger signals (Clarke, 70). This was very soon after the Bretagne began to sheer (Roberts, 149).

The District Judge does not express any distinct opinion as to whether the Narragansett was in fault for not having a stationed lookout forward at the bow of one of the carfloats or on the roof of the cars. He says:

> " The Narragansett did not have a lookout,
> " but it appears that the accident did not oc-
> " cur by reason of the absence of one, and such
> " circumstances should be disregarded" (Opinion, 783).

Claimant's principal argument has been that Captain Clarke himself did not have an unobstructed view of approaching vessels. Captain Clarke testified that he stood at least 12 inches above the tops of the freight cars, and had an unobstructed view. The clearance was certainly sufficient for the purpose.

But the fact that Captain Clarke had an unobstructed view around him does not depend upon his

unsupported word. Those in charge of the independent tugs in the vicinity saw that the pilot-house of the Narragansett was high enough to permit her navigator to see over the cars (Knott, 136; Gallagher, 175; Day, 187; Coleman, 136).

It is true that the Narragansett maintained no stationed lookout.

It may be doubted whether it is the practice on any vessel to maintain one in similar waters in the day time and during good weather.

A well-recognized practice by seamen and harbor men generally not to do so in these waters on a clear day has been proved and is undisputed in the record (Clarke, 512). There is no lack of judicial authority to sanction it.

The Bendo, 44 Fed., 439, 444.
The R. R. Kirkland, 48 Fed., 760, 762.
The Hercules, 70 Fed., 334.
The Caro, 23 Fed., 734.
Haney v. *Baltimore S. Packet Co.*, 64 U. S., 287, 302.
Cianciminos Towing Co. v. *The Ripple*, 41 Fed., 63.
The N. Y. Central No. 22, 124 Fed., 750, 135 Fed., 1021.

The propriety of not maintaining a stationed lookout on the tug is supported by the practice on the *steamer*.

The third lieutenant of the Bretagne testified:

> "Q. Did you have any regular lookout
> " posted forward on your ship?
> " A. The second captain—several men were
> " there.
> " Q. So far as you know, had any one been
> " instructed to act as lookout?
> " A. No; no one.
> " Q. On this occasion was there any report
> " from the fo'castle head?
> " A. No." (Roch, 582.)

The witness also says, " a lookout is not put away
" forward on the stem except when the weather is

" thick and you can not see from the bridge " (582). This was undoubtedly the practice on La Bretagne, as it is on most ships, and libellant has found no fault with it. The pilot also testified:

> " Q. Did you have any person posted as " lookout?
> " A. Well, there are always competent " officers on board these ships.
> " Q. Did you have any person charged with " the duties of lookout?
> " A. No, I didn't."

He also says that no report was made (Sullivan, 302).

VII.

The Narragansett did all that the circumstances required in the matter of whistling.

In harbors like New York, whistle signals should only be exchanged between vessels whose navigation, with reference to each other, is affected by some fair doubt. To give them in other cases would produce confusion and would deny to vessels that for safety stand in need of a whistle agreement the opportunity of making one.

These principles were acted on in the present case.

As the various vessels mentioned in the Record were originally approaching, only the Bretagne and the *Tice* stood in need of a whistle agreement. The courses of all the other vessels were such as not to require alteration to give all the desirable margin of safety.

The *Tice* therefore blew one blast to the steamer and, after an ordinary interval, received a signal of one blast in reply (Coleman, 108, 111; Day, 182; Knott, 131, 127).

The steamer had, up to this time, been in a starboard to starboard situation with reference to the Narragansett (Coleman, 112; Day, 188; Knott, 124, 125; Roberts, 148; Clarke, 64, 65), on a course adapted to pass the Narragansett by an amply safe margin (Opinion, 773, 782, 789) of 500 or 600 feet at the very lowest estimate (Knott, 142; Coleman, 109; Day, 189; Clarke, 67).

When La Bretagne answered the *Tice's* signal, the steamer was about 2,000 feet (four lengths) from the Narragansett (Clarke, 65).

For the Narragansett to have whistled up to this time or, indeed, at any time before the Bretagne's sheer began to menace her, would not only have been superfluous; it would have been detrimental to the *Tice* and, possibly, to the *Runyon* also (the latter bound north on a course parallel with and between those of the *Tice* and Narragansett), because of interfering with their opportunity for whistle exchanges with La Bretagne.

That the Narragansett promptly blew alarm signals and reversed as soon as the steamer's sheer impaired the prospective safe margin of passing has not been questioned (Opinion, 788; Clarke, 70; Roberts, 149).

The steamer claims, indeed, to have blown a second single-blast signal, but this was not heard on the Narragansett or on any of the tugs in the vicinity. If a second signal was blown, it was doubtless just as the Narragansett was sounding her alarm signals. Some of the steamer's witnesses describe it as having been given when the Narragansett was only about a length away (Morice, 608). It was substantially at this distance that the Narragansett's alarm whistles are admitted to have been heard on the Bretagne (Sullivan, 324), and that the order to reverse the engines of the latter was given (Roch, 554; Poncelet, 351, 485).

The initial situation and the mode of producing a collision in this case were almost paralleled in *The Atlantic City* (143 Fed., 451).

The steamer Sylvan Glen was bound up, and the ferryboat Atlantic City bound down the Delaware River on parallel courses adapted to enable the vessels to pass each other safely starboard to starboard, when the Sylvan Glen, under a port helm, sheered across the bow of the ferryboat. Each vessel claimed to have blown a passing signal, which the other vessel denied hearing. A decision holding the ferryboat partly in fault for not blowing danger signals and slowing to bare steerageway was reversed by the Circuit Court of Appeals. Says Judge Gray:

> "As the distance between them was lessened, each vessel had a right to suppose that the other was cognizant of and appreciated, the situation and the conduct necessary to safety, which was that each should keep on its course and thus pass starboard to starboard. *No signalling was necessary* to inform either vessel what such a situation required. . . . The course of safety was obvious to both parties and nothing was due or necessary in the way of signalling from one to the other. No signal was required from one vessel to inform the other that they were to pass starboard to starboard" (143 Fed., at 454, 455).

There is nothing in the Inland Rules of Congress to require the giving of whistle signals, unless vessels are approaching so nearly head and head, "as to involve risk of collision" (Art. 18, Rule I). It does not appear whether or not there was at this time any additional requirement in force under the Supervising Inspectors' Rules. These rules, not having been proved, are not before the Court for consideration.

The E. A. Packer, 140 U. S., 360, 367, 368; 58 Fed., 251, 255.

But even were there a rule requiring whistling in every case where a vessel comes within a half mile radius of another, as there was in *The Lord O'Neill*,

66 Fed., 77, the Narragansett's technical violation of the rule would not warrant a division of damages.

In two well-considered cases, the conclusion just stated has been adopted by the Court on facts almost identical with those in the present case.

The Lord O'Neill (C. C. A.), 66 Fed., 77.

In re Rend, 126 Fed., 564.

VIII.

At the utmost, it cannot be said that the claimant has done more than create a doubt whether libellant should be inculpated.

This is insufficient to warrant a division of damages, the fault of La Bretagne, adequate to explain the collision, having been clearly shown.

The City of New York, 147 U. S., 72, 85.
The Ludvig Holberg, 157 U. S., 60, 71.
The Oregon, 158 U. S., 186, 197.

The principle has been held applicable to alleged infractions of the narrow channel rule,

U. S. v. *Port of Portland*, 161 Fed., 193;
The Westhall, 153 Fed., 1010);

of the rule requiring fairways to be kept free from anchored vessels,

The Newburgh, 130 Fed., 321, 324;

and of the rule requiring passing whistles,

The Lord O'Neill, 66 Fed,, 77, 80.

It has also been held applicable to errors of the other vessel where the vessel primarily in fault has ported from a starboard to starboard situation.

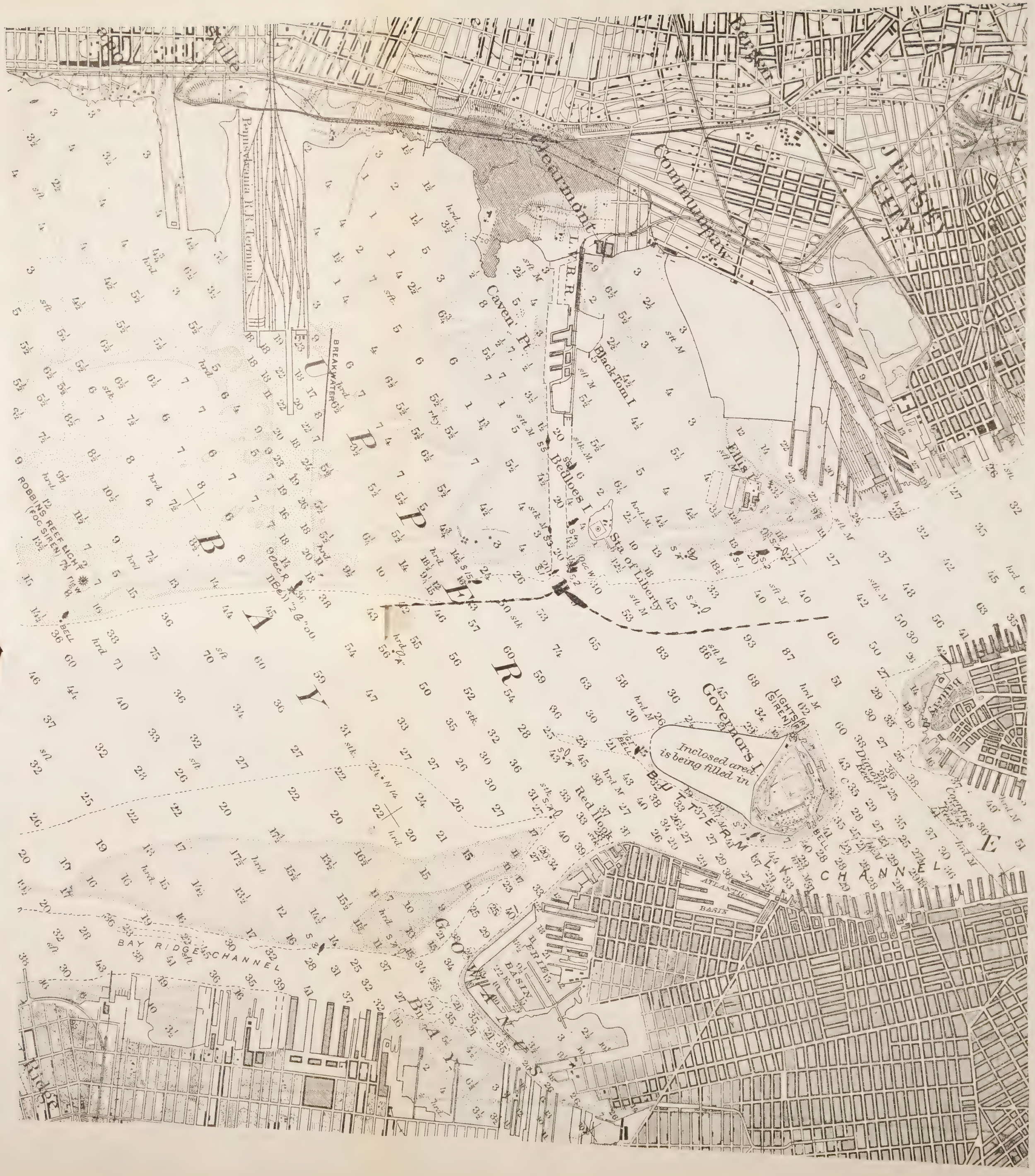
The Mexico, 78 Fed., 653, 656; affd. 84 Fed., 504.

IX.

The decree of the District Court should be reversed, with costs, with instructions to enter a decree in favor of the libellant for full damages with interest and costs.

WALLACE, BUTLER & BROWN,
Proctors for the Baltimore and Ohio Railroad Co.

FREDERICK M. BROWN,
Advocate.



Pennsylvania R.R. Terminal
BREAKWATER
Clearmont
Communipaw
L.V.R.R.
Caven Pt.
Black Tom I.
Bedloes I.
Sta. of Liberty
Ellis I.
JERSEY CITY
Governors I.
Inclosed area is being filled in
Red Hook
BUTTERMILK CHANNEL
ATLANTIC BASIN
ERIE BASIN
GOWANUS BAY
BAY RIDGE CHANNEL
ROBBINS REEF LIGHT (FOG SIREN)
Dimond Reef
Coenties Reef

2

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

THE BARBER ASPHALT PAVING COMPANY
Complainant-Appellee

vs.

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY ET AL.
Defendants-Appellees

WILLIAM W. LADD, AS RECEIVER OF THE NEW YORK CITY RAILWAY COMPANY

FREDERICK W. WHITRIDGE, AS RECEIVER OF THE THIRD AVENUE RAILWAY COMPANY

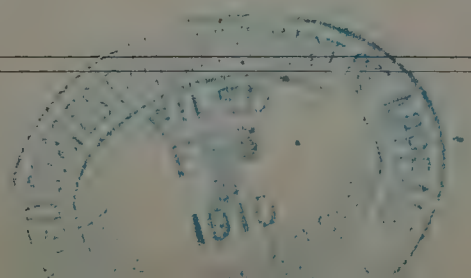
THE CENTRAL TRUST COMPANY OF NEW YORK
Appellants

(CLAIM 172)

TRANSCRIPT OF RECORD

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

PRINTED UNDER THE DIRECTION OF THE CLERK



INDEX.

PAGE

Proof of Claim of Receivers of N. Y. City Railway Company..... 1
Objection of Central Trust Company to Claim 18
Proceedings before Special Master..... 21–54

TESTIMONY BEFORE SPECIAL MASTER ON FIRST HEARING.

Claimant's Testimony.

Robert Gray—
Direct 47
Cross..... 48

Testimony for Central Trust Company.

Leon C. Benkers—
Direct 62
Cross..... 65

William J. Bradley—
Direct 72

Frederick J. Fuller—
Direct 79

Report of Special Master on Claim No. 172.. 83
Notice of Filing of Exceptions..... 111
Exceptions of Receivers of N. Y. City Railway Company..... 113
Notice of Hearing on Exceptions..... 116
Opinion, Lacombe, *C. J.*..... 118
Order of June 15, 1909..... 120
Proceedings before Special Master on Rehearing.....124, 193, 266

Testimony before Special Master on Rehearing.

Claimant's Testimony.

PAGE

George C. Hunt—
Direct..... 128

Henry W. Brown—
Direct..... 132
Cross..... 137
Redirect.....157, 179
Recross..... 168
Recalled:
Direct..... 208
Cross..... 219
Redirect..... 233
Recross..... 234

J. R. C. Armstrong—
Direct..... 235

Testimony for Third Avenue Railroad Company.

Hardie B. Walmsley—
Direct.....181, 206

Reuen Martin—
Direct..... 244

Claimant's Exhibits:

D. Extract from minutes of Board of Directors June 27/07, 42nd St., etc., Ry., and plan for settlement of construction liabilities..... 37
E. Note for $893,433.30, Apl. 30/07..... 48

Third Avenue R. R. Co. Exhibits:

2. Extract from stock ledger, 42nd St., etc., Ry. Co..... 186
3. Extract from stock ledger, a/c with Morton Trust Co..... 189
List of stockholders on June 30/00..... 190
List of stockholders on Apl. 30/07..... 191

PAGE

4. Blank form of reports to State Board of R. R. Commissioners..... 224
5. Blank form of reports to State Board of R. Commissioners..... 229

Extracts from Minutes of Stockholders' Meetings:

January 18, 1900..... 193
January 17, 1901..... 196
January 16, 1902..... 196
January 15, 1903 197
January 21, 1904..... 199
January 19, 1905..... 201
January 18, 1906..... 201
January 17, 1907..... 203

Extracts from Minutes of Board of Directors' Meetings:

March 30, 1900..... 194
June 27, 1900..... 195
February 28, 1901..... 196
January 23, 1902..... 197
January 22, 1903..... 199
March 17, 1904..... 200
January 26, 1905..... 201
January 26, 1906..... 202
May 10, 1906..... 202
February 28, 1907..... 203

Master's Report on Rehearing..... 271
Notice of Filing of Exceptions..... 288
Exceptions of Receiver of N. Y. City Railway Company..... 290
Notice of Hearing on Exceptions..... 293
Opinion, Lacombe, *C. J.*..... 295
Order of December 29, 1909..... 298

Appeal of Receiver of New York City Railway Company.

	PAGE
Citation	301
Petition for Appeal	303
Assignment of Errors	305
Clerk's Certificate	310

Appeal of Receiver of Third Avenue Railroad Company.

Petition for Appeal	311
Assignment of Errors	313
Citation	315

Appeal of Central Trust Company of New York.

Petition for Appeal	317
Assignment of Errors	319
Citation	321
Proof of Service of Appeal Papers	323
Stipulation as to Record	325
Clerk's Certificate to additional Record	326
Stipulation and Order Consolidating Appeals.	328

1

NEW YORK CITY RAILWAY COMPANY,
Lessee.

METROPOLITAN STREET RAILWAY SYSTEM.

Cable Building.

621 Broadway.

2

ADRIAN H. JOLINE,
DOUGLAS ROBINSON, } *Receivers.*

New York, May 8th, 1908.

MR. EDWARDS H. CHILDS, Special Master,
42nd St., Manhattanville & St. Nich.
Ave. R. R. Co.,
59 Wall Street, City.

Dear Sir.—I enclose herewith Proof of Unsecured Claims of the Receivers of the New York City Railway Co. against the 42d St., Manhattanville & St. Nicholas Ave. Railway Co., amounting to $1,003,149.96. 3

Kindly acknowledge receipt.

Yours very truly,
H. W. BROWN,
Auditor to Receivers.

4 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS
5 AVENUE RAILWAY COMPANY,
Defendant.

Proof of unsecured claims of Receivers of New York City Railway Company.

STATE OF NEW YORK, }
County of New York, } ss.:

Adrian H. Joline and Douglas Robinson being duly sworn, say that they are the Receivers of the New York City Railway Company, the claimants above named,

6 That the annexed account is in all respects just and true,

That the sum of One million three thousand, one hundred forty-nine and 96/100 dollars ($1,003,149.96) was justly due and owing thereon on the first day of February, 1908,

That no payments have been made thereon, and that no security is held therefor; that deponents are informed and believe that there may be offsets or counterclaims thereto, but deponents cannot at present state their nature or amount, as the information in regard thereto is in the posses-

sion of the Forty-second Street, Manhattanville & St. Nicholas Ave. Railway Company, or its Receiver. 7

ADRIAN H. JOLINE,
DOUGLAS ROBINSON.

Sworn to before me this 8 day of May, 1908.

PETER C. NICKEL,
[SEAL.] Notary Public No. 15.
N. Y. Co.

8

ADRIAN H. JOLINE AND DOUGLAS ROBINSON, RECEIVERS, NEW YORK CITY RAILWAY COMPANY.

IN ACCOUNT WITH 42ND ST., MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY.

RECAPITULATION SHEET.

DEBITS:		
May, 1907		$985,635.92
June "		145,898.37
July "		101,112.07
Aug. "		123,257.08
Sept. "		93,745.55
" "		21,261.08
Oct. "		110,580.69
Nov. "		104,676.80
Dec. "		95,450.90 9
Jan., 1908		69,511.34
	Total Debits	$1,851,129.80
CREDITS:		
May, 1907		$89,224.06
June "		137,903.49
July "		130,710.73
Aug. "		80,386.55
Sept. "		5,466.95
" "		125,712.77
Oct. "		4,841.37
Nov. "		4,007.23
Dec. "		3,190.96
Jan., 1908		30,478.15
	Total	$611,922.26

10 DEBITS, *continued:*

Bills Paid.	Number.		
Nov. 27, 1907	466	.....	$49,236.00
" 27, "	467	.....	23,345.91
" 27, "	468	.....	50,749.05
" 15, "	7281	.....	35,479.15
Dec. 23, "	708	.....	12,102.78
" 23, "	709	.....	24,618.00
" 23, "	710	.....	37,713.70
May 5, 1908	2242	.....	2,187.61
" 23, "	2242	.....	625.38
		Total.....	$236,057.58
		Total Credits.....	$847,979.84
Balance due Adrian H. Joline & Douglas Robinson, Receivers New York City Railway Co.....			$1,003,149.96

11

*

ADRIAN H. JOLINE AND DOUGLAS ROBINSON, RECEIVERS, NEW YORK CITY RAILWAY COMPANY.

IN ACCOUNT WITH 42ND ST., MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY.

DEBITS:

1907.

May Note dated 4/30/07 to N. Y. City Ry.

Bill No.	*Description.*	*Amount.*
	Co.	$893,433.30
960	Int. on R. E. Mtge. $100,000 @ 5%....	416.67
982	Materials & Supplies furnished.....	809.58
1647	Pay roll accrued, reversal.....	28.69
1648	April Express Mileage.....	31.05
955	Rent of Tracks.....	808.33
951	7½% of Labor & Material furnished....	921.45
	Int. on floating debt, credited in June	21,260.34
962	Material & Supplies.....	295.95
7285	Cash Fares below 45th Street on B'way	33,170.55
980	Provender furnished	672.69
7261	Power furnished	12,043.56
950	Water Tax	1.14
967	Proportion of General Expenses, account of Wages of Stablemen & Provender	16.58
958	Proportion of cost of operating Emergency Wagons	211.24
953	Use of Trucks & Carts.....	282.20
	Pay rolls accrued, credited in June....	13.41
	" " " " " "	8.40

12

DEBITS, *continued:* 13

	Bill No.	*Description.*	*Amount.*
	954	Rent of Car Houses	1,726.56
	961	Material & Supplies furnished	6,068.33
	976	Labor furnished as per pay rolls	4,187.95
	957	Hired Equipment	1,590.00
	949	Proportion of General Expenses distributed on a car mileage basis	281.42
	972	Sundry Expenses paid through Audited Vouchers for Miscellaneous Supplies	5,962.23
	952	Your proportion of cost of re-wiring cars	20.80
	959	Compensation for legal services rendered	1,373.50
		Total Debits for May, 1907	$985,635.92
June	960	Int. on Real Estate Mortgage	416.66
	955	Rent of Tracks	808.34
	1669	May Express Mileage	22.76
	981	Material & Supplies	445.82
		Int. on floating debt, credited in June	21,199.37
	951	7½% of Labor & Material furnished, during the month of May, 1907	698.75
	7262	Power furnished	11,672.94
	963	Material & Supplies	31.65
	980	Provender furnished	493.20
	953	Use of Trucks & Carts	188.30
	957	Hired Equipment	1,600.00
	985	Balance paid Int. R. T. Co. account of interchange of "L" Transfers	32.48
	7284	Cash fares below 45th Street on Broadway	34,478.20
	954	Rent of Car Houses	1,766.65
	950	Water Tax	12.58
	961	Materials & Supplies furnished	9,339.80
		Pay rolls accrued, credited in July	212.97
	956	Int. on notes dated April 30, 1907, @ 4% to N. Y. City Ry. Co. & 3rd Ave. R. R. Co. for the months of May and June, 1907	49,236.00
1907.			
June	958	Proportion of cost of operating Emergency Wagons	$173.78
	968	Proportion of General Expenses, account of Wages of Stablemen & Provender	14.73
		Adjustment express mileage credited in June, 1907	10.00
	977	Labor furnished as per pay-rolls	3,302.03

14

15

16 DEBITS, *continued:*

	Bill No.	*Description.*	*Amount.*
	983	Materials & Supplies furnished.....	482.44
	962	" " "	1,430.97
	949	Proportion of General Expenses distributed on a car mileage basis.....	192.42
	973	Sundry Expenses paid through Audited Vouchers for miscellaneous supplies..	4,586.32
	959	Compensation for legal services rendered	1,085.32
	965	Insurance Premiums paid for your Company	1,411.43
	966	Settlement of claim paid, case of Lynch	300.00
	965	Insurance Premiums paid for your Company	156.51
17	964	Cable furnished	95.95
		Total Debits for June, 1907.....$145,898.37	
July	960	Int. on Real Estate Mortgage.....	416.67
	955	Rent of Tracks.....	808.33
	1667	June Express Mileage.....	30.34
	7263	Power furnished.....	11,421.21
	7283	Cash fares below 45th Street on Broadway	38,807.90
		Reversal of pay-rolls accrued.....	6.06
	954	Rent of Car Houses.....	1,766.65
	956	Interest on notes to N. Y. City Ry. Co. & 3rd Ave. R. R. Co.....	24,618.00
	953	Trucks & Carts furnished.....	371.80
	950	Water Tax	7.64
	951	7½% of Labor & Materials furnished during the month of June, 1907.....	1,036.52
18	962	Material & Supplies furnished.....	438.79
		Pay rolls accrued, credited in Aug., 1907	92.46
	980	Provender supplied.....	598.58
	958	Proportion of Expense of Operating Emergency Wagons.....	211.39
	969	Proportion of General Charges account of Horse shoeing, wages of stablemen and Provender.....	17.28
	978	Labor furnished as per pay rolls.....	5,695.61
	971	Proportion of General Expenses of the Solicitor's Dept.....	.31
	959	Compensation for Legal Services rendered	1,119.30
	961	Material & Supplies furnished.....	6,727.81

DEBITS, *continued:* 19

	Bill No.	*Description.*	*Amount.*
	957	Hired Equipment	1,570.00
	949	Proportion of General Expenses distributed on a car mileage basis	165.24
	974	Sundry Expenses paid through Audited Vouchers	5.119.45
	971	Proportion of salary of General Solicitor & his Office force	64.73
		Total Debits for July, 1907	$101,112.07
Aug.	960	Interest on Real Estate Mortgage	416.67
	954	Rent of Tracks	808.33
	1668	July Express Mileage	14.04
	7282	Cash fares below 45th Street on Broadway	45,961.15
		Pay rolls accrued reversal	212.50
	954	Rent of Car Houses	1,766.65
	956	Interest on Notes	24,618.00
	951	7½% of Labor & Material furnished during the month of July, 1907	898.45
	984	Material & Supplies furnished	618.73
	950	Water Tax	7.55
	953	Use of Trucks & Carts	547.45
	985	Balance paid Int. R. T. Co. on account of interchange of "L" Transfers	12.24
	980	Provender furnished	866.56
		Pay rolls accrued	208.65
	7264	Power furnished	11,228.31
	970	Proportion of General Expenses on account of Horse-shoeing, wages of stablemen & Provender	17.94
	979	Labor furnished as per pay rolls	7,258.38
	962	Material & Supplies furnished	13,278.45
	961	" " "	7,721.93
	958	Proportion of cost of operating Emergency Wagons	177.83
	971	Proportion of General Expenses of the Solicitor's Dept.	15.26
	952	Proportion of cost of re-wiring cars	100.53
	957	Hired Equipment	1,670.00
	961	Electric Cable furnished	201.57
	949	Proportion of Expenses distributed on a Car mileage basis	157.68
	975	Sundry Expenses paid through Audited Vouchers	4,132.63
	959	Compensation for legal services rendered	339.60
		Total Debits for August, 1907	$123,257.08

20

21

22 DEBITS, *continued:*

Sept.	*Bill No.*	*Description.*	*Amount.*
1-24	1000	Interest on Real Estate Mortgage.....	333.33
	999	Rent of Tracks.....	646.67
	1664	August Express Mileage.....	14.54
	7281	Cash fares below 45th St. on B'way....	35,479.15
	466	Interest on notes.....	19,694.40
		Pay rolls accrued, credited in August..	161.28
	998	Water Tax	5.36
	997	7½% of Labor & Material furnished during the month of August, 1907....	2,233.64
	992	Provender supplied.....	637.05
	996	Material & Supplies furnished.....	2,399,92
	995	" " "	5,293.56
	994	Use of Trucks and Carts.....	545.85
	993	Hired Equipment.....	1,376.00
23	1003	Labor furnished as per pay rolls.....	8,068.07
	1125	Balance paid Int. R. T. Co. account of interchange of "L" Transfers.....	51.12
	1001	Additional Provender supplied in August	47.81
	467	Power furnished.....	9,105.18
	1002	Rent of Car Houses.....	1,413.32
	1657	Material & Supplies furnished.....	1,196.11
	1658	7½% of Labor & Material furnished from Sept. 1st to 24th, 1907, inc....	1,078.73
	1679	Audited Voucher adjustment.....	25.60
	1659	Compensation for legal service rendered	218.88
	1660	Proportion of Treasurer's Petty Cash Expenditures	70.04
	1661	Proportion of cost of re-wiring Cars..	30.91
	1649	Material & Supplies furnished.....	475.75
24	1650	Proportion of General Expenses account of wages of General Horse Shoer, General stable foreman and Provender handled	14.46
	1651	Proportion of General Expenses of the Solicitor's Dept.	3.19
	1652	Sundry Expenses paid through Audited Vouchers	2,229.65
	1653	Proportion of Expense of operating Emergency Wagons.....	124.15
	1654	Proportion of Treasurer's Petty Cash Expense	20.32
	1655	Proportion of General Expenses distributed on a car mileage basis.....	751.51
		Total Debits for Sept. 1 to 24, 1907..	$93,745.55

DEBITS, *continued:*

Sept.	*Bill No.*	*Description.*	*Amount.*	
25-30	1022	7½% of Labor & Material furnished, for use of tools, etc.	309.36	25
	1013	Use of Trucks & Carts	20.60	
	1014	Provender supplied	111.88	
	467	Power furnished	2,181.54	
	1015	Water Tax	1.34	
	466	Interest on notes	4,923.60	
	1016	Rent of Tracks	161.67	
	1017	Interest on Real Estate Mortgage	83.33	
	1018	Rent of Car Houses	353.33	
	468	Cash Fares below 45th St. on B'way	7,802.55	
	1019	Hired Equipment	344.00	
	1006	Material & Supplies furnished	112.29	
	1007	" " "	2,697.46	
		Pay rolls accrued, credited in October	879.20	
	1008-1779	Labor furnished as per pay-rolls	1,046.33	26
	1009	Sundry Expenses paid through Audited Vouchers	34.70	
	1010	Proportion of Cost of operating Emergency Wagons	13.71	
	1011	Proportion of salaries of General Horse Shoer, General Stable Foreman, and cost of handling Provender	3.76	
	1012	Proportion of Sundry Expenses distributed on a car mileage basis	176.64	
	1790	Petty cash expended by Treasurer	3.79	
		Total Debits for Sept. 25-30, 1907	$21,261.08	
Oct.	1025	Electric Cable furnished	1.73	
	1026	Trucks & Carts furnished	182.28	
	467	Power furnished	12,059.19	
	1027	Water Tax	6.69	27
	468	Cash fares below 45th St. on Broadway	42,946.50	
	1028	Hired Equipment	1,720.00	
	1024	Rent of Car Houses	1,766.65	
	1029	Provender supplied	881.44	
	1030	Materials & Supplies furnished	629.34	
	1030	" " "	9,540.65	
	1030	Interest on Real Estate Mortgage	416.67	
	1030	Rent of Tracks	808.33	
	466	Interest on notes	24,618.00	
	1023	Materials & Supplies furnished	1,204.79	
	1125	Balance paid Int. R. T. Co. account of interchange of "L" Transfers	1.76	
	1023	Material & Supplies furnished	691.20	
	1023	" " "	18.08	

28 DEBITS, *continued:*

	Bill No.	*Description.*	*Amount*
	1673	Express mileage for September.....	2.60
		Pay rolls accrued, credited in September	176.47
	1023	Sundry Expenses paid through Audited Vouchers	890.10
	1023	Labor furnished as per pay rolls.....	10,946.34
	1022	Proportion of cost of operating Emergency Wagons	169.21
	1022	Proportion of General Expenses of Solicitor's Department.....	1.16
	1022	Proportion of cost of re-wiring cars....	71.40
	1022	Proportion of wages of General Horse shoer, foreman, General Stable Foreman and cost of handling provender..	25.86
29	1022	Proportion of General Expenses distributed on a car mileage basis.....	801.24
	1022	Sundry Expense paid through Audited Vouchers	3.01
		Total Debits for October, 1907.....	$110,580.69
Nov.	710	Cash fares below 45th St. on Broadway	$37,713.70
	1033	Balance paid Int. R. T. Co. account of interchange of "L" Transfers....	16.24
	1033	Material & Supplies furnished.....	586.24
	1033	Water Tax	7.55
	1033	Rent of Car Houses.....	1,766.65
	708	Power furnished.....	12,102.78
	709	Interest on notes.....	24,618.00
	1033	Rent of Tracks.....	808.33
		Pay rolls accrued, credited in October..	56.49
30	1033	Material & Supplies furnished.....	9.83
	1033	Interest on Real Estate Mortgage.....	416.67
	1033	Material & Supplies furnished.....	1,262.61
	1033	Hired Equipment	1,670.00
	1033	Material & Supplies furnished.....	8,397.94
		Estimated horse maintenance at 130th St. Stable, credited in October, 1907..	1,026.77
	1033	Labor furnished as per pay rolls.....	8,654.74
	1640	Use of Trucks & Carts.....	207.22
	1033	Provender supplied.....	1,165.56
		Pay rolls accrued, credited in December	333.78
	1674	Express mileage for October, 1907....	20.02
	1641	Proportion of Wages paid General Horse Shoer, Foreman, and General Stable Foreman and cost of handling provender	23.61

DEBITS, *continued:* 31

	Bill No.	*Description.*	*Amount.*
	1642	Proportion of cost of re-wiring cars...	231.11
	1643	7½% of Labor furnished during the month of October, 1907.....	1,336.63
	1644	Proportion of cost of operating Emergency Wagons.....	149.81
	1033	Sundry Expenses paid through Audited Vouchers	1,894.61
	1646	Proportion of General Expenses of the Solicitor's Department.....	1.58
	1634	Proportion of General Expenses distributed on a car mileage basis.....	197.65
		Total Debits for November, 1907.....$104,676.80	
Dec.	946	Power furnished.....	13,374.84
	1034	Rent of Car House.....	1,766.65
	1034	Water Tax	12.76
	1034	Interest on Real Estate Mortgage.....	416.66
	1034	Material & Supplies furnished.....	617.17
	944	Cash fares below 45th St. on B'way....	35,670.65
	1034	Hired Equipment.....	1,680.00
	1034	Provender Supplied.....	734.53
	1637	Material & Supplies furnished.....	385.31
	1638	Express car mileage for November, 1907	24.62
	1034-1639	Material & Supplies furnished.....	3,637.41
	945	Interest on notes.....	24,618.00
	1676	Use of Trucks & Carts.....	374.17
	1034-1680	Labor furnished as per pay roll.....	8,915.40
	1034-1681	Sundry Expenses paid through Audited Vouchers	436.85
	1034	Rent of Tracks.....	808.33
	1682	Proportion of General Expenses of Solicitor's Department.....	2.02
	1683	Proportion of cost of re-wiring cars....	60.90
	1684	Proportion of wages of General Horse shoer Foreman and General Stable Foreman and cost of handling Provender	22.03
	1685	7½% of Labor and Material furnished your Company during November, 1907, for use of tools, etc	1,240.32
	1686	Proportion of cost of operating Emergency Wagons	131.32
	1671	Proportion of General Expenses distributed on a car mileage basis.....	520.96
		Total Debits for December, 1907.....	$95,450.90

32

33

34 DEBITS, *continued:*

1908.	*Bill No.*	*Description.*	*Amount.*
Jan.	1742	Provender supplied	292.00
	1127	Interest on Real Estate Mortgage	152.78
	1181-1182		
	1366-1740	Cash fares collected on cars of your Company below 45th St. on Broadway	35,536.90
	1127-1763	Interest on notes	10,912.73
	1746	Use of Trucks & Carts	137.65
	1739	Water Tax	7.55
	1738	Materials & Supplies furnished	685.57
	1737	" " "	252.60
	1736	" " "	1,621.77
	1748	Rent of Tracks	808.34
	1749	Proportion of wages of General Horse shoer, General Stableman and General Expenses of handling Provender	8.25
35			
	1750	Miscellaneous Expenses paid through Audited Vouchers	203.56
	1768	Labor furnished as per pay-rolls	3,675.01
	1783	Power furnished	11,282.95
	1784	Express car mileage for December, 1907	24.62
	1787	Proportion of cost of operating Emergency Wagons	148.53
	1782	Rent of Car Houses	55.00
	2242	Injuries & Damages, Oct., Nov., Dec./07, Jan./08	2,812.99
	2243	Proportion of General Expenses January, /08	118.26
	2438	7½% of Labor & Material furnished in Dec., 1907, for use of tools, etc.	774.28
36			
		Total Debits for January, 1908	$69,511.34

CREDITS:

1907.			
May	987	Amount due your Company for advertising	416.66
	1670	Estimated amount of wages of employees of this Company charged through pay-rolls accrued in April	684.62
	991	Emergency Wagon horses stabled at 130th St. Stable	46.50
	42d St.	6% of cost of sidings, switches, etc., used by Express Cars	53.17
		Payment on account	80,000.00

CREDIT:

	Bill No.	*Description.*	*Amount.*	
	42d St.	Track Rent	3,176.39	37
	7261	Power furnished American Express Co.	50.28	
	42d St.	Rent of Tracks used by Express Cars..	22.76	
	989	Proportion of amount received from sale of Car Board boxes	7.18	
	985	Balance received from Int. R. T. Co. on account of interchange of "L" Transfers	103.44	
	42d St.	Labor furnished as per your pay rolls	1,039.43	
	988	Adjustment of material & supplies charged to your Company in April..	2,880.00	
	42d St.	Amount due for stabling horses at 130th St. Stable, on the basis ownership of horses	743.63	38
		Total Credits for May, 1907	$89,224.06	
June	987	Proportion of amount received for advertising	416.67	
	991	Amount due your Company for maintaining Emergency Wagon horses at 130th St. Stable	45.00	
	42d St.	6% of cost of sidings, switches, etc., of your Company, used for express traffic	53.17	
		Pay rolls accrued, charged in May, 1907	13.41	
	42d St.	Pay Rolls accrued, charged in May, 1907	8.40	
	7262	Power furnished American Express Co., and charged to that Company by N. Y. City Ry. Co.	47.88	39
	42d St.	Rent of Tracks	2,582.12	
	42d St.	Rent of Tracks used by express cars....	30.34	
		Pay rolls accrued, charged in July, 1907	6.06	
		Interest on floating debt charged in May & June, 1907, credited on account of settlement, April 30, 1907	42,459.71	
	42d St.	Labor furnished as per pay-rolls	925.33	
	989	Amount received for your Company as per bills collectible	354.92	
		Adjustment of express mileage	10.00	
		Payment on account	90,000.00	
	42d St.	Maintenance of horses at 130th St. stable, used by N. Y. City Ry. Co...	828.35	

40 CREDIT:

	Bill No.	*Description.*	*Amount.*
	990	Money received from sale of old transfers	1.28
	986	Discount on oil received from Haggerty Refining Co.	120.85
		Total Credits for June, 1907	$137,903.49
July	987	Proportion of amount received for advertising	416.67
	42d St.	6% of cost of sidings, switches, etc., used by Express Cars	53.17
	991	Amount due for stabling horses at 130th St. Stable	46.50
	42d St.	Rent of Tracks	1,285.65
		Pay rolls, accrued, charged in June	212.97
41	42d St.	Rent of Tracks used by express cars	14.04
		Payment on account	125,000.00
	985	Balance received from Int. R. T. Co. on account of interchange of "L" transfers	44.36
	42d St.	Labor furnished as per pay-rolls	2,384.79
		Pay rolls accrued, charged in August	212.50
	7263	Power furnished American Express Co. at 42d St.	57.75
	42d St.	N. Y. City Ry. Co. horses stabled at 130th St. stable	982.33
		Total Credits for July, 1907	$130,710.73
Aug.	987	Proportion of amount received for advertising	416.67
	42d St.	6% of cost of sidings, switches, etc. used by express cars	53.17
42	991	Emergency Wagon horses stabled at 130th St. stable	46.50
		Pay rolls accrued, charged in July	92.46
		" " " " Sept. 1-24	161.28
		Payment on account	75,000.00
	986	Proportion of discount received on oils	24.72
	42d St.	Labor furnished as per 42d St. pay rolls	3,166.48
	42d St.	Rent of tracks used by express cars	14.54
	7264	Power furnished American Express Co. at 42d St. building	52.41
	989	Proportion of amount received from sale of scrap	331.55
	42d St.	N. Y. City Ry. Co. horses stabled at 130th St. stable	1,026.77
		Total Credits for August, 1907	$80,386.55

CREDIT: 43

Sept.	*Bill No.*	*Description.*	*Amount.*
1-24.	1005	Proportion of amount received for advertising	333.33
	42d St.	6% of cost of sidings, switches, etc., used by express cars	42.54
		Pay rolls accrued, charged in August	208.65
	1665	Proportion of excess wages	.13
	42d St.	Emergency wagon horses stabled at 130th St. stable	36.00
	1004	Adjustment of amount charged through Audited Vouchers	1,500.00
	42d St.	Rent of tracks used by express cars	10.40
	42d St.	Power furnished American Express Co. at 42d St. building	33.48
	42d St.	Labor furnished as per 42d St. pay rolls	2,488.58 44
	42d St.	N. Y. City Ry. Co. horses stabled at 130th St. Stable	813.84
		Total Credits, Sept. 1-24, 1907	$5,466.95
Sept.			
25-30.	42d St.	Emergency wagon horses stabled at 130th St. Stable	9.00
	42d St.	Rent of Tracks used by Express Cars	2.60
	42d St.	Amount due from American Express Co. for power supplied at 42d St. Depot	8.37
	1021	Proportion of amount received for advertising	83.33
	42d St.	6% of cost of sidings, switches, etc. used by Express Cars	10.63
	1125	Balance received from Int. R. T. Co. on account of interchange of "L" transfers	2.44 45
	42d St.	Labor furnished as per 42d St. pay rolls	192.32
		Payment on account	125,000.00
	1020-1656	Proportion of amount received for scrap material sold	9.07
		Pay rolls accrued, charged in October	176.47
	42d St.	N. Y. City horses stabled at 130th St. Stable	218.54
		Total amount of Credits, Sept. 25-30 /07	$125,712.77
Oct.	42d St.	Rent of tracks used by Express Cars	20.02
	1032	Proportion of amount received for advertising	416.67
	1031	Proportion of amount received for private telephone calls	.26
	42d St.	Amount due from the American Express Co. for power supplied at 42d St. Depot	51.21

46 CREDIT:

	Bill No.	*Description.*	*Amount.*
	42d St.	Amount due your Company for stabling Emergency Wagon horses at 130th St. stable.....	46.50
	42d St.	6% of cost of your sidings, switches, etc., used by express cars.....	53.17
		Pay rolls accrued, charged in September	879.20
	1022	Amount received from sale of scrap material	815.08
	42d St.	Labor furnished as per 42d St. pay rolls	1,476.00
		Pay rolls accrued, charged in November	56.49
47		Amount due for stabling N. Y. City Ry. Co. horses at 130th St. Stable (estimated, adjusted in Nov. accounts)...	1,026.77
		Total amount of Credits October, 1907	$4,841.37
Nov.	42d St.	6% of cost of your sidings, switches, etc., used by express cars.....	53.17
	42d St.	Amount due from American Express Co. for power supplied at 42d St. Depot	48.87
	1635	Proportion of excess wages.....	.93
	42d St.	Emergency wagon horses stables at 130th St. Stable.....	45.00
	1032	Proportion of amount received for advertising	416.67
48	42d St.	Amount due your Company for stabling this Company's horses at 130th St. stable during October, 1907.....	1,163.72
	42d St.	Rent of tracks used by express cars....	24.62
	42d St.	Labor furnished by your Company as per your pay rolls.....	956.97
	42d St.	Amount due your Company for stabling horses at 130th St. stable.....	1,288.95
	1636	Proportion of amount received from sale of old transfers	8.33
		Total amount of Credits November, 1907	4,007.23
Dec.	1672	Credit on account of overcharge for feed supplied in December, 1907.....	12.00
	42d St.	Amount due for stabling Emergency Wagon horses at 130th St. Stable....	46.50
	1032	Proportion of amount received for advertising	416.66
	42d St.	6% of cost of your sidings, switches, etc., used by express cars.....	53.17

CREDIT: 49

Bill No.	*Description.*	*Amount.*
42d St.	Amount due from American Express Co. for power supplied at 42d St. Depot	52.23
42d St.	Rent of tracks used by express cars	24.62
1034	Balance received from Int. R. T. Co. on account of interchange of "L" Transfers	99.68
1677	Proportion of excess wages	2.88
	Pay rolls accrued, charged in November, 1907	333.78
1678	Proportion of amount received from sale of scrap material	76.13
42d St.	Amount due for stabling horses at 130th St. Stable	1,269.11
42d St.	Labor furnished as per your pay rolls 50	804.20
	Total amount of Credits December, 1907	$3,190.96
1908.		
Jan. 42d St.	6% of cost of your sidings, switches, etc., used by express cars	53.17
42d St.	Rent of tracks used by express cars	23.93
	Payment on account	25,000.00
1788	Power furnished American Express Co. charged to them by New York City Ry. Company	44.70
1789	Amount due your Company for stabling Emergency Wagon horses at 130th St.	16.50
2244	Proportion of salary, H. W. Brown	24.81
2245	Stabling horses 130th St. stable 51	118.98
2246	Injuries and Damages, Oct. Nov. Dec. & Jan.	5,138.67
2439	Proportion of amount received from sale of old transfers	5.21
2440	Proportion of amount received from sale of scrap	52.18
	Total amount of Credits January, 1908	$30,478.15

[Endorsed]—No. 172.—Proof of Claim.—Received May 8, 1908. F. T. C.—Filed May 26, 1909.—U. S. Circuit Court, Southern District, N. Y.—JOHN A. SHIELDS, Clerk.

52 CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

BARBER ASPHALT PAVING COMPANY,
Complainant,

against

FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY and Ors.,
53 *Defendants.*

Sir.—You will please take notice that the Central Trust Company of New York, a corporation organized under the Laws of the State of New York, having its office and principal place of business at No. 54 Wall Street, Borough of Manhattan, City of New York, as Trustee for the bondholders of bonds issued under a mortgage made by The Third Avenue Railroad Company, bearing date May 15th, 1900, hereby files its objections to the claim of Adrian H. Joline and Douglas Robinson as Receivers of the New York City Railway Company, which claim for the sum of $1,003,149.96 was filed in this suit with the Special Master appointed to receive claims on May 8th, 1908, and reserves its rights to examine into the validity of each and every item of said claim and demands that notice of any proceedings toward the proof thereof or hearings thereon be
54

given to the undersigned for and in behalf of said Central Trust Company of New York. 55

Dated New York, May 19th, 1908.

Yours, etc.,
BOWERS & SANDS,
Solicitors for Central Trust Company of New York,
No. 31 Nassau St.,
Borough of Manhattan, N. Y.

To Edwards H. Childs, Esq.,
Special Master,
59 Wall Street, N. Y. 56

(Endorsed) filed May 4, 1909.

57

58 UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

vs.

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILROAD COMPANY,
59 *Defendant.*

In Equity.

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company.

No. 172.

STENOGRAPHER'S MINUTES.

60 Filed May 4th, 1909, U. S. Circuit Court, Southern District, N. Y.

JOHN A. SHIELDS,
Clerk.

UNITED STATES CIRCUIT COURT, 61

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

vs.

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILROAD COMPANY,
Defendant. 62

IN THE MATTER

of

The Claim of ADRIAN H. JOLINE and DOUGLAS ROBINSON, as Receivers of the New York City Railway Company.

In Equity.

No. 172.

New York, September 1, 1908.

63

APPEARANCES:

DEXTER, OSBORN & FLEMING (by GEORGE N. WHITTLESEY), Solicitors for William W. Ladd, as Receiver of the New York City Railway Company, substituted in place of former Receivers, Joline & Robinson.

No other appearance.

Mr. Whittlesey: Mr. William W. Ladd was appointed as receiver of the New York City Railway

64 Company in place of Messrs. Joline and Robinson, by order of the United States Circuit Court, dated July 24, 1908, his appointment to take effect at midnight between July 31st and August 1st, 1908; and has qualified by filing the required bond. Dexter, Osborn & Fleming are solicitors and counsel for Mr. Ladd as Receiver. In order to familiarize ourselves with the various litigations and in particular with the numerous items of the claims of the New York City receivers in this proceeding, we ask for an adjournment of the hearing on this claim to September 22nd. We ask this for
65 the further reason that we are endeavoring to come to some arrangement with the attorneys for Mr. Whitridge as receiver of the defendant company, by which a trial of the facts before the Special Master can be greatly expedited. We are now affording counsel for the receiver of the defendant opportunity for the inspection of the New York City Railway Company's books and vouchers for such purpose. I present to the Special Master herewith a stipulation, dated August 31st, signed by Messrs. Merrill & Rogers, solicitors for the receiver, Messrs. Bowers & Sands, solicitors for the Central Trust Company of New York, Messrs.
66 Dexter, Osborn & Fleming, solicitors for William W. Ladd as receiver for the New York City Railway Company, adjoining this hearing, and also the hearing upon the objection of the receivers of the New York City Railway Company to the claim of the Central Trust Company of New York for interest on certain notes, such claim for interest being contained in the claim of the Central Trust Company of New York filed with the Special Master herein, adjourning to the 22nd day of September, 1908, at 11 o'clock in the forenoon—consenting to that adjournment.

The Master: The hearing on the claim is adjourned to September 22, 1908, at 11 o'clock A. M., at which time a certified copy of the order appointing Mr. Ladd, receiver in the place of Messrs. Joline and Robinson should be filed with me. 67

Adjourned to Tuesday, September 22, 1908, at 11 A. M.

New York, September 22, 1908.

APPEARANCES:

DEXTER, OSBORN & FLEMING (by GEORGE N. WHITTLESEY), Solicitors for William W. Ladd, as Receiver of the New York City Railway Company, substituted in place of former Receivers, Joline and Robinson. 68

No other appearance.

Mr. Whittlesey: If your Honor please, on behalf of the Receiver I would say that since the last adjournment we have been endeavoring, with Mr. Holbrook, to expedite the proof of this claim, and until very recently we have not had the statement of Mr. Brown, the auditor of the Receivers of the Metropolitan system, giving the explanation of the items of the claim which Mr. Holbrook had asked, and in consequence neither Mr. Holbrook nor ourselves have been able to make sufficient progress so as to go on with the proof of claim to-day, and we ask for an adjournment to October 6th; and in support of that we present to the Master a stipulation signed by Merrill & Rogers, solicitors for Mr. Whitridge, as Receiver of the 42nd Street, Manhattanville and St. Nicholas Railroad Company, Messrs. Bowers & Sands, solicitors for the Central Trust Company, and Dex- 69

70 ter, Osborn & Fleming, attorneys for the Receiver of the New York City Railway Company, consenting to such adjournment; and also to an adjournment of the hearing upon the objection of the Receiver of the New York City Railway Company to the claim of the Central Trust Company of New York for interest on notes, such claim for interest being contained in the claim of the Central Trust Company of New York filed with the Special Master herein.

The Master: Do you expect to be ready to proceed on October 6th?

71 Mr. Whittlesey: We expect to be ready to proceed on October 6th. I cannot guarantee anything, because I do not know, but of course if we are not ready then the Special Master can act accordingly, but we expect to be ready at that time.

The Master: The Master states that he is not willing to continue to grant adjournments in this proceeding indefinitely, and warns counsel that if they cannot be ready to go on and actually try this case that he will disallow the claim; that in view of the stipulation signed by all the parties, and in view of the fact that Mr. Ladd has recently been substituted as Receiver he will grant a further ad-

72 journment, but it will be impossible for him to have a hearing on the 6th of October. An adjournment to Friday, October 2, 1908, at 11 A. M., is granted.

The Master asks if counsel has a certified copy of the order appointing Mr. Ladd receiver.

Mr. Whittlesey: I have it prepared and I will send it down to you later.

The Master directed that a certified copy of the order appointing Receiver Ladd be filed with him forthwith in order that the record may be made perfectly clear.

Adjourned to Friday, October 2, 1908, at 11 A. M.

New York, October 2, 1908, 11 A. M. 73

Adjourned at the request of all parties, by written stipulation signed by them, to Wednesday, October 14, 1908, at 11 o'clock A. M.

New York, October 14, 1908.

APPEARANCES:

DEXTER, OSBORN & FLEMING (by MATTHEW C. FLEMING and GEORGE N. WHITTLESEY), Solicitors for William W. Ladd, as Receiver of the New York City Railway Company, substituted in place of former Receivers, Joline and Robinson. 74

ALFRED H. HOLBROOK, of Counsel for F. W. Whitridge, as Receiver of the 42nd Street Railway and also of the Third Avenue Railroad.

BOWERS & SANDS (by GEORGE W. DAVISON and LEONCE FULLER), Solicitors for the Central Trust Company.

Mr. Whittlesey: If the Master please, the claim 75
of the receiver of the New York City Railway against the defendant herein arises out of the complicated operation of the New York City Railway and the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad, and the relations between the two companies. The 42nd Street, Manhattanville & St. Nicholas Avenue Railroad was a part of the New York City Railway system, but not as most of the other railways were. It was separately operated, had its separate corporate organization and employees and separate books were kept of its accounts.

76 Prior to April, 1900, the Third Avenue Railroad had acquired a large majority of the stock of the defendant, to the amount of $1,671,100 par value of the total capital stock of $2,500,000. It was through this control of stock that the Third Avenue Railroad virtually controlled the defendant corporation, and not by way of lease. On the 13th day of April, 1900, the Third Avenue Railroad Company leased its own railway lines and all those which were controlled by it, to the Metropolitan Street Railway Company for a term of 999 years, at the same time transferring to the Metro-
77 politan Street Railroad Company its holdings of stock in the various controlled companies, including this defendant company. By a lease dated February 14, 1902, the Metropolitan Street Railroad Company in turn leased to the Interurban Street Railway Company its entire system, including the railways which it had leased from the Third Avenue Railroad Company, and also transferred to the Interurban Street Railway Company its holdings in various companies, including this defendant corporation. The Interurban Street Railway Company very shortly thereafter changed its name, by due and legal proceedings, to the New
78 York City Railway, the identity of the corporation not being changed.

The Master: The New York City Railway became the owner of most of the stock of the 42nd Street Company, did it?

Mr. Whittlesey: Yes.

Mr. Holbrook: A majority of both stock and bonds was owned by the New York City at all times.

Mr. Whittlesey: Yes, there were bonds which were also owned by the Third Avenue Railroad; and whatever control the New York City Railway Company acquired over the 42nd Street,

was due to its ownership of stock and bonds and not to any lease. 79

The Master: As matter of law the corporate entity of the 42nd Street road was free and independent except as its stock controlled it.

Mr. Whittlesey: Yes. Operation of the Street Railway system under the last mentioned lease continued down to the 24th day of September, 1907, when receivers were appointed by the United States Circuit Court for the Southern District of New York in an action between the Pennsylvania Steel Company and another as complainant, against the New York City Railway Company, defendant, and this claim was filed by those receivers. 80

In addition to the stock of the defendant company which has been above mentioned as being owned by the Third Avenue Railroad and assigned eventually to the New York City Railway Company, the Third Avenue Railroad Company also owned 357 of the Second Mortgage 1,000 Income Bonds of the defendant corporation, dated the 1st of July, 1885, and those were also transferred and assigned in the same manner as the stock. Both stock and bonds had been pledged under the Third Avenue Consolidated Mortgage, dated May 15, 1900, and made by the Third Avenue Railroad Company to the Morton Trust Company. 81

The Master: When were they pledged under that mortgage?

Mr. Whittlesey: The mortgage was dated May 15, 1900.

The Master: When was the lease of the Metropolitan to the Interurban?

Mr. Fleming: February 14th, 1902.

Mr. Whittlesey: In the first place, it was from the Third Avenue to the Metropolitan and that was the first lease under which these stocks and

82 bonds were assigned. The lease antedated the mortgage, but was made subject to it in terms, and the fact that these stocks and bonds were to be pledged under the mortgage was stated in the lease.

As above stated, the defendant carried on its own independent operation and kept its separate accounts, but the relations between the Third Avenue Railroad Company and thereafter the Metropolitan Street Railway Company and thereafter the New York City Railway Company, with the 42nd Street, were very close and they interchanged power and equipment, the use of car
83 houses, the use of tracks, &c., and under the New York City Railway Company management the New York City furnished the defendant company with some of its employees and took care of its legal department to some extent and that all gave rise to an elaborate system of debit and credit, charges by the New York City against the defendant and charges by the defendant against the New York City. The Metropolitan and the New York City also made large advances from time to time for construction work which was done on the defendant's property, and ad-
84 vances for equipment furnished to the defendant.

A general statement of accounts between the New York City Railway Company on the one hand and the various subsidiary companies, including the defendant, on the other hand was taken in the spring of 1907, the statement of account being taken as of April 30, 1907. At that time it was found that the defendant corporation was then in debt to the New York City Railway Company and also the Third Avenue Railroad Company, a debt which had been outstanding for some time, and increasing, and which was incurred in the way which has been generally stated.

The debt to the Third Avenue Railroad Company was taken up by a note upon which a claim has been filed here by the Central Trust Company of New York, the note being for $6,491,967.44. The defendant's debt to the New York City Railway Company amounted to $893,433.30, as of April 30, 1907, and was taken up by a note of the defendant to the New York City Railway Company of that date. 85

The Master: That note is part of your claim?

Mr. Whittlesey: Yes, that note constitutes the large item of our claim. Our claim also includes large amounts for interest on the note given to the New York City Railway Company. 86

The Master: This same note?

Mr. Whittlesey: Yes, and our claim also includes interest on the note given at that time to the Third Avenue Railroad, the six million dollars and odd, the New York City Railway Company claiming to be entitled to such interest on the ground that as successor to the Metropolitan Street Railway Company as lessee under the Third Avenue lease of April 13, 1900, the New York City Railway was entitled to all of the income.

The Master: As against the mortgagee?

Mr. Whittlesey: As against the Third Avenue Railroad Company and also against the mortgagee. 87

The items composing this claim, in addition to the items of the note given to the New York City Railway Company and for interest on that note and on the note for six million dollars and odd now held by the Central Trust Company of New York consist of charges for materials and supplies furnished to the defendant for provender furnished to them and power, and for rent of equipment, car houses and tracks, some of which were incurred under express written agreement,

88 others without any written agreement but charged by the New York City as a fair charge.

The Master: Pursuant to their general custom?

Mr. Whittlesey: Pursuant to their general custom.

The Master: And continuing the custom which had existed prior to that time and which resulted in the giving of the note?

Mr. Whittlesey: Yes. The items that went in to make up the aggregate of the notes are of the same general nature.

I will say further that our account is made up, which is practically a transcript of the books of
89 the New York City Railway Company down to the time of the receivership, and the books of the receivers since that time; and further I understand that it is identical with the showing of the books of the defendant company.

For the cash outlay made by the receivers since their appointment on the 24th of September, 1907, and up to February 1st, the claimant expects to be paid in cash to the extent that he has not already been reimbursed.

I would further state that it appears by the first report of Mr. Whitridge as receiver therein that
90 he made payments to the receivers of the New York City Railway Company, for similar charges, charges similar to those that appear in this claim, and apparently continued the same system of interchanging power, equipment, etc.

Mr. Davison: I move on behalf of the Central Trust Company that the claim be dismissed on its face, upon the opening of counsel. The claim is based on a note of $893,433.30 and an open account of $109,000, in which open account appear charges for interest of something over $200,000, so that but for the charge of interest on notes there would be no debit balance against the 42nd Street road,

but a credit balance in their favor as against the New York City. 91

The Master: I will deny the motion to dismiss on the claimant's opening, without prejudice to a renewal thereof on the same grounds when the evidence referred to on the opening is actually introduced.

Exception by Mr. Davison.

It is stipulated that any objection made by either side shall stand as the objection of all parties on that side of the case.

Mr. Whittlesey: I call for the general ledger of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company, in the possession of the receiver of the 42nd Street, Manhattanville & St. Nicholas Avenue Railroad Company, for the production of which I have served on the receiver a subpœna *duces tecum*. 92

I offer in evidence a book endorsed, "General Ledger No. 2, 42nd Street, Manhattanville & St. Nicholas Avenue Railroad Company," page 5; also pages 160 to 164 inclusive.

Mr. Holbrook: The Receiver desires to state that he has no book that he believes to be the real ledger of the 42nd Street Railroad Company, but he produces a book specified, which is one copied, he understands, from the book of the New York City Railway Company by the bookkeeper of the New York City Railway Company, and objects to the book going in evidence on the ground that it is not a record of the 42nd Street Railroad, but in reality a copy of the records of the New York City Railway. 93

The Master: The objection is on the ground that the book that has been produced is not a book of original entry and not an original account book of the defendant?

94 Mr. Holbrook: Yes.

The Master: Mr. Holbrook, do you admit that these books are books produced pursuant to the subpœna *duces tecum* served on the receiver, and were books in his possession and appear upon their face to be the books described and called for in the subpœna?

Mr. Holbrook: Yes.

The Master: I will overrule the objection.

Mr. Davison: I join with Mr. Holbrook in the objection.

The Master: The objections will be noted.

95 Mr. Whittlesey: I also call for the General Journal No. 2 and General Cash Book No. 1 of the defendant corporation, for the production of which the same subpœna *duces tecum* was served on the receiver.

The Master: The books are produced. The same admission and the same objection made on behalf of the receiver and the same ruling and exception.

Mr. Whittlesey: I offer in evidence from the General Journal No. 2, pages 101 to 189 inclusive.

Same objection, ruling and exception.

96 Mr. Whittlesey: Also from the General Cash Book No. 1, pages 174 to 212, inclusive.

Same objection, ruling and exception.

The General Ledger above referred to is marked Exhibit A of October 14, 1908.

The General Journal is marked Exhibit B of October 14, 1908.

The General Cash Book is marked Exhibit C of October 14, 1908.

The further hearing of this claim is adjourned to Wednesday, October 21, 1908, at 11 A. M.

New York, October 21, 1908, 11 A. M. 97

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, as Receiver of the New York City Railway Company, substituted in place of former Receivers, Joline and Robinson;

GEORGE N. WHITTLESEY, of Counsel.

MERRILL & ROGERS, Solicitors for Receiver;

ALFRED H. HOLBROOK, of Counsel.

BOWERS & SANDS, Solicitors for the Central Trust Company; 98

GEORGE W. DAVISON, of Counsel.

Mr. Whittlesey: We ask for an adjournment of one week in this matter.

The Master: You are not ready to make any stipulations?

Mr. Whittlesey: Not at this time. Mr. Holbrook sent us a proposed stipulation as to a great many of the facts comprising our claim regarding the source of items, etc., and we are having that verified now by our accountant. We have an accountant at work there, and anything which we 99 can stipulate we will, but we are not ready today. We are trying to clear up the whole matter.

The Master: I want to ask Mr. Davison, counsel for the Central Trust Company, this question: As I understand, the position which you have taken on behalf of the Central Trust Company in this claim is that the claim should be disallowed, and in that connection I desire to call your attention to the possible question of whether in the event that it should be determined that the claim itself was a proper one, the Central Trust Com-

100 pany could claim any interest therein under the terms of the First Consolidated Mortgage. Claim No. 70 of the Central Trust Company is based on a promissory note which was turned over to the trustee of that mortgage, pursuant to the terms thereof, and I should like to know whether the legal situation with respect to the promissory note that forms part of this claim is any different?

Mr. Davison: I think it is, but if it should be allowed as a claim, there is no doubt in my mind that under the mortgage the Central Trust Company would be entitled to the claim against the company, rather than the New York City Railway
101 Company.

The Master: I want you to consider whether you desire to maintain the position you have taken up to this time in the matter of this particular claim, or whether you desire to claim that the promissory note involved represented an indebtedness which should have been turned over to the Trustee of the mortgage.

The further hearing of this matter is adjourned to Friday, October 30, 1908, at 2 P. M.

102

New York, October 30, 1908, 2 P. M. 103

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, Receiver of the New York City Railway Co.;
GEORGE N. WHITTLESEY, of Counsel.
MERRILL & ROGERS, Solicitors for Receiver Whitridge;
J. H. HILLIARD, of Counsel.
BOWERS & SANDS, Solicitors for Central Trust Company;
GEORGE W. DAVISON, of Counsel. 104

The Master: I notice that the title of this claim on the calendar still reads Messrs. Joline and Robinson as receivers. It should be changed to read William W. Ladd, as receiver of the New York City Railway Company. A certified copy of the order made by Judge Lacombe, dated July 24, 1908, and filed on July 27, 1908, appointing Mr. Ladd receiver in the place of Messrs. Joline and Robinson was duly filed in this office on September 22, 1908, and Mr. Ladd is recognized as the claimant before me from that time. 105

Mr. Whittlesey: Mr. Ladd and Mr. Davison are negotiating in this matter. Perhaps Mr. Davison can explain that better than I can.

Mr. Davison: Negotiations are pending between the three receivers and have progressed, but no conclusion has as yet been reached, and I therefore suggest an adjournment.

All parties present join in the request for an adjournment for one week.

Adjourned to Friday, November 6, 1908, at 11 A. M.

106 New York, November 6, 1908,
11 A. M.

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, as Receiver of the New York City Railway Company, substituted in place of former Receivers, Joline and Robinson.

GEORGE N. WHITTLESEY, of Counsel.

BOWERS & SANDS, Solicitors for Receivers;

107 GEORGE W. DAVISON, } *of Counsel.*
MR. FULLER, }

MERRILL & ROGERS, Solicitors for the Receiver;

ALFRED H. HOLBROOK, of Counsel.

Mr. Whittlesey: I call for the minute book of the 42nd Street, Manhattanville & St. Nicholas Railroad Company, called for by the subpœna *duces tecum* served on the Receiver and filed with the Special Master at the last meeting.

(Book produced by counsel for the Receiver.)

Mr. Whittlesey: I offer in evidence extract from
108 the minute book of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company, containing the record of the special meeting of the Board of Directors of the said company, held on June 27, 1907, it being pages 389, 390 and 391 of said minute book, and the final settlement attached to page 389.

Mr. Holbrook: I object on the ground that the minute book purports to give the minutes of the Board of Directors that had been elected by the stock held by the New York City Railway, and further on the ground that the New York City Railway Company at that time was in control,

through its officers, of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company. Therefore the minutes of the meeting are not the free and untrammeled discretion of the directors; and on the ground that the Receiver repudiates this note by reason of the close connection of the two companies and repudiates the action of the Board. 109

Mr. Davison: I object on the ground that the minutes refer to a mortgage made by the Third Avenue Railroad Company to the Morton Trust Company, bearing date May 15, 1900, and without the introduction of that mortgage into the minutes they are meaningless or might mean something very different from that. I think that should be coupled with that and made a part of the minutes. 110

The Master: The facts upon which Mr. Holbrook's objection for the Receiver are based have not been introduced in evidence thus far in the proceeding. I understand that these facts and also the mortgage referred to in the objection made by Mr. Davison on behalf of the Central Trust Company are to be introduced before the proceeding upon this claim is closed, and at any rate I will overrule the objections and receive the evidence, subject to a motion to strike out. 111

Exception by Mr. Holbrook and by Mr. Davison.

Marked Claimant's Exhibit D, and the following is a copy thereof:

"Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company.
Plan for Settlement of
Construction Liabilities
as of April 30, 1907.

"The attached balance sheet shows that there has been expended to April 30, 1907, for Con-

112 struction and Equipment .....6,391,967.44 in excess of the amount of Capital Stock, Funded Debt and Real Estate mortgages outstanding. The funds for doing this work were obtained from the following sources:

The Third Avenue Railroad Company.

On the following six months 5% notes drawn by Wm. Jay, Receiver, which were paid by the 3d Ave. R. R. Co.:			
Favor Lorain Steel			
113 Co., dated Sept. 7, 1900		$33,755.17	
Favor Falk Co., dated Oct. 31, 1900		535.50	
Favor Naughton & Co., dated Jan. 28, 1901		178,780.00	
Favor Falk Co., dated Feb. 7, 1901		1,238.75	
On demand note favor 3d Ave. R. R. Co., dated July 1, 1901		$6,055,468.98	
On demand note favor 3d Ave. R. R. Co.,			
114 dated Apr. 30, 1904.		16,900.64	
On open account		16,804.49	$6,303,483.53

Metropolitan Street Railway Company.

On demand note dated April 30, 1904		5,075.46	
On open account		41,401.67	46,477.13

New York City Railway Company.

Amount expended by this Company from its earnings by withholding an equal amount from the amount due the N. Y. City Ry. Co. for power, labor, material, etc., furnished by that Company			42,006.78
Total			$6,391,967.44

"In June, 1903, this Company received a 115
credit of $100,000 from the Third Avenue Railroad Company, which was for the purpose of adjusting a supposed error made April 12, 1901, in charging this Company with the amount of Real Estate Mortgages, which had been acquired by that Company. It now appears that the cost of these Mortgages was not included by The Third Ave. Railroad Company in its charge against this Company for construction work, and therefore this credit should not have been made and should be reversed. This will increase the indebtedness of this company to The Third Ave. Railroad Company $100,000 or to $6,403,483.53. As this 116
$100,000 credit received from The Third Ave. Railroad Company was applied to this Company's construction account, the reversal of same will increase the construction to April 30, 1907, an equal amount, and therefore increase the amount expended for construction and equipment in excess of the amount of Capital Stock, Funded Debt and Real Estate Mortgages outstanding to $6,491,967.44.

"In order to liquidate the above indebtedness, the liability to the Metropolitan Street Railway Company of $46,477.13 and to the New York City Railway Co. of $42,006.78 should be assumed, with the consent of those companies, by the Third 117
Ave. Railroad Co. The above mentioned notes should then be cancelled and a new note, dated April 30, 1907, in the attached form, for $6,491,967.44 should be given to The Third Ave. Railroad Co., that company settling with the Metropolitan Street Railway Co. and New York City Railway Co. and depositing this note with the trustees under the first consolidated mortgage.

"FORTY-SECOND STREET, MANHATTAN AND ST. NICHOLAS AVENUE RAILWAY COMPANY.

"General Balance Sheet—April 30, 1907.

"Assets.

Capital Assets:		
Construction and Equipment		$11,691,967.44
Treasury Bonds		100,000.00
Total Capital Assets		$11,791,967.44
Operating Assets:		
Investments		1,500.00
Working Assets:		
Materials and Supplies	$582.22	
Undistributed Accounts	14,231.12	
Reserve for Injuries and Damages	9,057.33	
Insurance Premiums — Unexpired Proportion	127.04	23,997.71
Current Assets:		
Cash	$26,420.33	
Cash on deposit to pay matured interest	4,116.06	
Accounts receivable.	899.13	
		31,435.52
Due from Companies in System:		
Union Ry. Co. of New York City		22.00
Profit & Loss—Deficit		929,417.26
Total Operating Assets		$986,372.49
Total Assets		$12,778,339.93

"General Balance Sheet—April 30, 1907. 121

Liabilities.

Capital Liabilities:		
Capital Stock		$2,500,000.00
Funded Debt		2,800,000.00
Real Estate Mortgages		100,000.00
The Third Ave. Railroad Company—		
Notes Payable	$6,286,679.04	
Open Account	16,804.49	
		6,303,483.53
Metropolitan Street Railway Co.— 122		
Notes Payable	$5,075.46	
Open Account	41,401.67	
		46,477.13
New York City Railway Company		42,006.78
Total Capital Liabilities		$11,791,967.44

123

124 *Operating Liabilities.*

Current Liabilities:		
Audited Vouchers	$8,887.62	
Pay rolls accrued	2,973.38	
Matured Interest on Funded Debt	4,116.06	
Employees' Deposits	1,663.72	
Unclaimed Wages	797.12	
Accounts Payable	55.90	
		$18,493.80
Service Liabilities:		
Transfer Tickets Outstanding		1,307.24
125		
Accrued Accounts and Reserves:		
Interest on Funded Debt Accrued and not due	$12,000.00	
Taxes Accrued	59,906.89	
Reserve for Renewal of Horses	1,180.00	
		73,086.89
Due to Companies in System:		
New York City Railway Co.	$893,433.30	
Dry Dock, East Broadway & Battery R. R. Co.	51.26	
126		
		893,484.56
Total Operating Liabilities		$986,372.49
Total Liabilities		$12,778,339.93

Form of Note to be given The Third Avenue Railroad Company. 127

$6,491,967.44 New York, April 30, 1907.

For Value Received, we promise to pay to the Morton Trust Company, as Trustee under a certain indenture of mortgage, dated May 15, 1900, between The Third Avenue Railroad Company and said Trust Company, or order, on January 1, 2000, or the earlier maturity of the bonds secured by said indenture of mortgage, the sum of Six Million Four Hundred Ninety-one Thousand Nine Hundred Sixty-seven and 44/100 Dollars, with interest thereon from the date hereof at the rate 128
of four per cent. per annum, payable semi-annually on each July first and January first.

.....

By

.....

President.

.....

Treasurer.

129

130 "New York, June 27th, 1907.

"A special meeting of the Board of Directors of the 42nd Street, Manhattanville and St. Nicholas Avenue Railway Company was held, pursuant to call, at No. 621 Broadway, New York City, on Thursday, June 27th, 1907, at 2:30 o'clock P. M. There were present:

Messrs. John Beaver
George W. Linch
Frank F. Ogston
J. B. Johnson
John Byrns
131 Reune Martin
A. V. Porter
J. I. Burke.

"The resignation of Mr. Edwin Wolf as a director of the Company was presented, and on motion, accepted.

"Mr. R. L. Anderton, Jr., was nominated as a director of the company in the place of Mr. Edwin Wolf, resigned, and, on motion, duly seconded, unanimously elected.

"Mr. Anderton thereupon took his seat in the Board.

"The treasurer placed before the Board the
132 following plan for correction of an error in the accounts as to three certain real estate mortgages:

(annexed hereto)

"On motion, duly made and seconded, it was

"Resolved, That said erroneous credit set out in said statement be reversed upon the books of the company and the proper officers make the proper entries on the books of the Company therefor.

"The Treasurer placed before the Board a general balance sheet of this company of April 30, 1907, showing $6,391,967.44, expended for construction and equipment in excess of the amount

of capital stock and funded debt outstanding, due 133
The Third Avenue Railroad Company, the Metropolitan Street Railway Company and the New York City Railway Company:

(annexed hereto)

"On motion, duly made and seconded, it was

"Resolved, That the proper officers of the company be, and they hereby are, with the consent of said companies, and on cancellation of all notes of this company, representing indebtedness for construction and equipment, authorized and directed to execute, issue and deliver to the Third Avenue Railroad Company notes of this Company bearing date April 30, 1907, for the face 134
amount of said advances for construction and equipment, such notes to be payable to the Morton Trust Company, as Trustee under a certain indenture of mortgage, dated May 15, 1900, between the Third Avenue Railroad Company and said Trust Company, or order, on January 1, 2000, or on the earlier maturity of the bonds secured by said indenture of mortgage, and to bear interest at the rate of four per cent. per annum, payable on each January first and July first, thereafter.

"On motion, duly made and seconded, it was

"Resolved, That the proper officers of this 135
Company be, and they hereby are, authorized and directed to execute, issue and deliver demand notes of this company, payable to bearer, or otherwise, being interest at the rate of four per cent. per annum to cover the operating indebtedness of this Company as shown in said balance sheet.

"The Treasurer placed before the Board a statement showing an error in the accounts as to three certain real estate mortgages as follows:

(annexed hereto)

"On motion, duly made and seconded, it was

"Resolved, That the changes of the accounts

136 recommended by the Treasurer in the foregoing statement be approved and the proper officers of the Company be authorized to make such change in the Company's books.

"On motion, duly made and seconded, the Secretary was authorized and directed to deliver to The Third Avenue Railroad Company copies of the proceedings of this Board of this day.

"The President placed before the Board a copy of a decree of the Supreme Court in a case brought by the People of the State of New York against this Company, signed by Mr. Justice Bischoff, requiring the tearing up of certain tracks of this Company:

137 "On motion, duly made and seconded, it was

"RESOLVED, That the proper officers of this Company be, and they hereby are, authorized to take all necessary and proper steps for the carrying out of such decree.

"Thereupon the meeting adjourned.

(Sgd.) REUNE MARTIN,
Assistant Secretary."

Mr. Whittlesey: I will ask counsel for the receiver and for the Central Trust Company if they will admit on April 30, 1907, and on the 27th day of June, 1907, John Beaver was President and

138 Charles E. Warren was Secretary of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Mr. Davison: Mr. John Beaver was President of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company at this time and Mr. Charles E. Warren was Secretary and Treasurer, they having been elected at a meeting held on February 28th, 1907, as appears by the minutes.

Mr. Whittlesey: That statement is conceded by all parties.

ROBERT GRAY, called as a witness for the claim- 139
ant, being duly sworn, testifies as follows:

Direct-examination by Mr. Whittlesey:

Q. Mr. Gray, where do you live? A. Brooklyn.

Q. And what is your occupation? A. General bookkeeper.

Q. Where? A. For the New York City Railway Company, 621 Broadway.

Q. Do you know Charles E. Warren, who was Secretary of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. I do.

Q. And you know John Beaver, who was presi- 140
dent of that company? A. I do.

Q. Are you familiar with the signatures of each of those gentlemen? A. Yes, I am.

Q. You have seen them write? A. Yes.

Q. I show you what purports to be a note of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company, dated April 30, 1907, and ask if you recognize the signatures to that note (handing paper to witness)? A. Yes.

Q. Whose signatures are they? A. Mr. Charles E. Warren and Mr. John Beaver.

Q. The Charles E. Warren, who was Secretary of the 42nd Street, Manhattanville and St. Nich- 141
olas Avenue Railroad Company? A. Yes, sir.

Q. And the John Beaver who was President of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. Yes, sir.

Mr. Whittlesey: I offer this note in evidence.

Mr. Holbrook: I think I have a right to cross-examine this witness as to his knowledge.

The Master: That is right.

142 *Preliminary cross-examination by Mr. Holbrook:*

Q. Mr. Gray, what is your duty in connection with the Street Railway Company? A. Simply the position of general bookkeeper.

Q. And that was as bookkeeper of what books? A. The books in the office of the New York City Railway Company.

Q. Did that also include the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company books?

Mr. Whittlesey: Objected to.

Objection overruled.

143 Mr. Holbrook: I will withdraw the question since the witness will be held, and I will have an opportunity to examine him.

I object to the reception of the note in evidence upon the same ground that I objected to the receipt of the minutes.

Mr. Davison: And I object on the same ground.

The Master: Not on the ground that the note was not signed?

Mr. Davison: No, sir.

Objections overruled.

144 Exception by Mr. Davison and by Mr. Holbrook.

Note received in evidence and marked Claimant's Exhibit E, and the following is a copy thereof:

"893,433.30

New York City, April 30th, 1907.

On demand, the Forty-second Street, Manhattanville & St. Nicholas Ave. R. R. Co. promise to pay to the order of New York City Railway Company Eight hundred & ninety three thousand, four hundred, thirty three

30/100 Dollars at 621 Broadway, N. Y. City, with interest at 4%. 145
Value received.

FORTY-SECOND ST., MANHATTANVILLE AND
ST. NICHOLAS AVE. R. R. CO.,
By CHARLES E. WARREN,
Secretary,
JOHN BEAVER,
President."

No. Due

Mr. Whittlesey: I call for the ledger and journal of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company for the period from January 1st to February 2nd, 1908, and called for in the subpœna *duces tecum* served upon the receiver herein and filed with the Special Master at the last hearing. 146

The books are produced.

Mr. Whittlesey: I offer in evidence pages 36 and 37 of the ledger, page 36 being an account entitled "New York City Railway" and page 37 being entitled "Receivers of the New York City Railway Company"; and also from the journal so referred to at pages 1 to 13, inclusive; also in ledger No. 2 of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company at page 170, being the ledger account headed "Receivers of the New York City Railway." 147

Mr. Davison: We make the same objection.

Mr. Holbrook: We make the same objection.

Objections overuled.

Exception by Mr. Davison and by Mr. Holbrook.

Page 36 referred to is marked Claimant's Exhibit F.

148 Page 37 referred to is marked Claimant's Exhibit G.

Pages 1 to 13, inclusive, of the journal marked Claimant's Exhibit H.

Ledger No. 2, page 170, marked Claimant's Exhibit I.

The Master: I want it to appear of record that Mr. Gray is here ready to be cross-examined, and I ask Mr. Holbrook if he desires to cross-examine Mr. Gray.

Mr. Holbrook: I do not wish to cross-examine Mr. Gray.

149 The Master: I ask Mr. Davison if he wishes to cross-examine Mr. Gray?

Mr. Davison: No, sir, I do not think I do. Mr. Davison has no cross-examination of Mr. Gray.

Mr. Whittlesey: I will have prepared for my own use, as well as that of the Master, a statement analyzing the figures shown in the books, and the figures shown in our claim, and showing that the books support our claim on the open account.

CLAIMANT RESTS.

150 Mr. Davison: I move on behalf of the Central Trust Company to dismiss the claim on the open account on the ground that it appears on its face in that open account is charged interest on notes amounting to something over $200,000, I think, approximately, since April 30, 1907, which is an excess of the interest on the note of the New York City Railway Company by something like $175,000 or $180,000, and it appears from the minutes introduced in evidence that the other note was a note to the Morton Trust Company authorized on June, 1907, bearing date April

30, 1907, in which they have charged and received the interest, and their not being entitled to that the open account shows that they have been overpaid, and on the further ground that the counsel for the claimant has admitted that these transactions were made by virtue of two certain leases and a mortgage, and that we are entitled to refer to those leases and mortgages as a part of this case, and that by the terms of them the New York City Railway Company cannot have any claim against the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company. 151

The Master: I understand that your objection to the open account is that the claimant claims for interest on the six and a half million dollar note now held by the Central Trust Company, upon which the Central Trust Company has filed a claim here, which is Claim No. 70 on my record, and claims that the New York City Railway Company was not entitled to receive any interest on said note, and your position is if that question of law is sustained there is nothing left on the open account and with respect to the promissory note your objection is as stated. 152

Mr. Holbrook: I will join in the motion made by Mr. Davison, and not only as to the Receiver of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company, but also for the Receiver of the Third Avenue Railroad Company, having appeared for him under the lease. The point that the Receiver of the Third Avenue Railroad Company makes under the lease is that the New York City Railway expressly agreed to pay all the expenses as set forth. 153

The Master: And Mr. Holbrook makes this

154 objection in his capacity as counsel for the Receiver of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company, and also in his capacity as counsel for the Receiver of the Third Avenue Railroad Company.

Mr. Whittlesey: On behalf of the Receiver of the New York City Railway Company I would say that the mortgage and the leases are not in evidence. On my opening I made some reference to the mortgage and the leases. They are not in evidence. The fact that on the books of the defendant company appear
155 the items for interest on notes gives them their full effect as an admission against interest of a claim against that company. Those items are proper charges; they are an admission on interest. If they are to be attacked by bringing in the provisions of a mortgage and claim under the terms of that mortgage those items cannot be allowed, such attack is to be made as a matter of defense by the opposing parties.

The Master: It appearing that the counsel for the defendant and the Central Trust Com-
156 pany intend to rely in part at least upon the provisions of the two leases and the mortgage referred to, I conclude that I will not dispose of the questions raised by the motion until those documents are properly in evidence before me, and I will accordingly deny the motion to dismiss. Counsel may renew their motions to dismiss at any time.

Mr. Davison: Counsel for the Central Trust Company, and Mr. Holbrook as counsel for the Receiver of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company and counsel for the Receiver of the Third Avenue Railroad Company offer in evi-

dence a mortgage made by the Third Avenue Railroad Company to the Morton Trust Company, as trustee, bearing date May 15, 1900, and also a lease of the Third Avenue Railroad Company to the Metropolitan Street Railway Company, bearing date April 13, 1900, and also a lease made by the Metropolitan Street Railway Company to the Interurban Street Railway Company, bearing date February 14, 1902, being the same papers which were introduced in evidence in the matter of Claim No. 70 of the Central Trust Company. 157

Received without objection. 158

It is stipulated that copies of these exhibits handed to the Master for use in Claim No. 70 of the Central Trust Company be used by him in this claim in the place and stead of the originals.

It is stipulated that the name of the Interurban Street Railway Company was subsequently changed to the New York City Railway Company, and that the claimant here is the Receiver of said company.

It is stipulated that the Central Trust Company has been substituted as Trustee in said mortgage made by the Third Avenue Railroad Company in the place and stead of the Morton Trust Company therein named as such trustee. 159

After discussion it appears that the parties may agree upon a stipulation which may obviate the necessity of introducing further evidence, and they request an adjournment to November 11, 1908, at 11 o'clock A. M. for that purpose.

Adjourned to Wednesday, November 11, 1908, at 11 o'clock A. M.

New York, November 11, 1908, 11 A. M.

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, as Receiver of the New York City Railway Company, substituted in place of former Receivers, Joline and Robinson;

GEORGE N. WHITTLESEY, of Counsel.

BOWERS & SANDS, Solicitors for Central Trust Company;

GEORGE W. DAVISON,

MR. FULLER, of Counsel.

MERRILL & ROGERS, Solicitors for the Receiver;

ALFRED H. HOLBROOK, of Counsel.

Adjourned to Monday, November 16, 1908, at 10:15 A. M.

New York, November 16, 1908,
10:15 A. M.

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, as Receiver of the New York City Railway Company, substituted in place of former Receivers, Joline and Robinson;

GEORGE N. WHITTLESEY, of Counsel.

BOWERS & SANDS, Solicitors for Central Trust Company;

GEORGE W. DAVISON, of Counsel.

MERRILL & ROGERS, Solicitors for the Receiver;

ALFRED H. HOLBROOK, of Counsel.

It is stipulated that the New York City Railway 163
Company charged against the defendant herein interest at four per cent. per annum on the note for $6,491,967.44, dated April 30, 1907, made by the defendant to the Morton Trust Company, as trustee, for the period from April 30, 1907, the date of the note, to September 24, 1907, the date of the appointment of the Receivers of the New York City Railway Company, as follows:

For May and June, 1907	$43,279.78
For July, 1907	21,639.89
For August, 1907	21,639.89
For September 1 to 24, inclusive	17,311.91
Total to September 24, 1907, of	$103,871.47

164

The Receivers of the New York City Railway Company charged against the defendant herein interest at said rate on said note from the period beginning September 25, 1907, and ending January 11, 1908, when the Receivers of the New York City Railway Company turned over the defendant railroad, together with other railroads of the Third Avenue system, to the Receiver of the Third Avenue Railroad Company, as follows:

165

For the period of September 25 to September 30, 1907	$4,327.98
For October, 1907	21,639.89
For November, 1907	21,639.89
For December, 1907	21,639.89
For January 1 to 12, 1908	9,820.76
Making a total charge by the Receivers of	$79,068.41

166 And making a grand total charged both by the New York City Railway Company and by the Receivers of..... $182,940.08

The above items of interest charged as aforesaid are included as part of the claim filed herein by the Receiver of the New York City Railway Company.

Of the total amount of interest so charged the following items were paid specifically as payment of interest by the defendant to the receivers of the New York City Railway Company and are credited to the defendant in the said claim of the Receiver of the New York City Railway Company, to wit:

167

Bill No. 466:

Interest for September 1 to 24, 1907..... $17,311.91
Paid November 27, 1907.

For September 25 to 30..... 4,327.98
Paid November 27, 1907.

For October 21,639.89
Paid November 27, 1907.

168 Bill No. 709:

Interest for November, 1907..... $21,639.89
Paid December 23, 1907.

With respect to charges for interest made by the New York City Railway Company on said note prior to the appointment of receivers on September 24, 1907, no specific payments of interest on such note, as such, except as above stated, appears in said account.

Prior to September 24, 1907, the account is a statement of debits and credits, without any ap-

propriation of the credits to any particular item of charge. 169

It is stipulated that no interest was paid on account of said note to the Morton Trust Company or the Central Trust Company by the New York City Railway Company, or by its receivers or by the defendant.

It is stipulated that no demand was made by or on behalf of the Third Avenue Railroad Company or of the Morton Trust Company, as trustee of the mortgage, or on behalf of the Central Trust Company, as such trustee, prior to January 11, 1908.

Mr. Holbrook: We will accept the last paragraph of this stipulation, subject to withdrawing from it in case an investigation shows that the facts do not confirm it or that there are no facts bearing upon it, and the result of such investigation to be reported on November 23, 1908, at 2 P. M. 170

Mr. Davison: I cannot stipulate as to the Third Avenue Railroad Company, because I do not know anything about it.

It is stipulated that the stipulations made at this hearing in this claim may be used by the Master in Claim No. 70 of the Central Trust Company, with the same force and effect as though again separately presented in that claim. 171

Mr. Davison: I offer in evidence a memorandum opinion rendered by Judge Lacombe on October 8, 1907, in a suit pending in the United States Circuit Court for the Southern District of New York, in which the Pennsylvania Steel Company and another are complainants and the New York City Railway Company is defendant.

I also offer in evidence petition of Joline and Robinson, Receivers, entitled in the same cause,

172 verified December 13, 1907, and filed on the same date, asking for instructions in regard to the operation of the Third Avenue Railroad Company, which is found at page 66 of Volume IV of proceedings in the same receivership.

I also offer in evidence memorandum of Judge Lacombe upon the petition last offered in evidence, which memorandum was filed December 13, 1907, and is found at page 89 of the said volume in said proceeding.

I also offer in evidence notice of hearing upon the petition of Joline and Robinson, with proof of service, which is found at page 791 of the same
173 volume, petition of the Third Avenue Railroad Company, verified December 13, 1907, to prove that the petition was filed for an order on the facts stated, and not as evidence on the facts stated, which is found at page 11 of Volume V.

I also offer in evidence notice of motion upon said petition, which is found at page 6 of Volume V.

I also offer in evidence answer of Joline and Robinson, Receivers, to the petition of the Third Avenue Railroad Company, verified January 4, 1908, and filed on the same day, which is found at
174 page 83 of Volume V of said proceedings.

I also offer in evidence opinion of Judge Lacombe, filed January 4, 1908, found at page 90 of Volume V.

I also offer in evidence order appointing Howard Taylor, Special Master, to take proofs presented by these petitions, filed January 10, 1908, which is found at page 94 of Volume V.

I also offer in evidence report of Howard Taylor, filed March 19, 1908, which is found at page 225 of Volume VII of said proceeding.

I also offer in evidence the order filed March

24, dismissing the petition of the Third Avenue Railroad Company, which is found at page 227 of Volume VII of said proceeding. 175

Mr. Whittlesey: I do not object to the introduction of the evidence in so far as it shows merely the non-adoption of the lease of the New York City Railway Company by the Receivers of the New York City Railway Company, but I do object to its introduction as proof of the facts stated in the various petitions, etc., which are very numerous, and for any other purpose than to show the non-adoption of the lease.

The Master: I understand they are offered for such purpose. 176

Mr. Davison: You do not object that these are copies instead of originals?

Mr. Whittlesey: No, I do not object on that ground.

The Master: The evidence is received for the purpose indicated by Mr. Whittlesey, in accordance with his consent.

The further hearing in this claim is adjourned to Monday, November 23, 1908, at 2 P. M.

The Master announces that Claim No. 172 of William W. Ladd, Receiver, etc., on the calendar for Tuesday, November 24th, 1908, at 2 P. M., has been adjourned to Friday, November 27th, 1908, at 2 P. M. 177

187 New York, November 27th, 1909,
2:00 P. M.

Met pursuant to adjournment.

The Special Master, after stating that the following claims have been duly noticed for hearing this day at 2:00 P. M., proceeds to call the same.

No. 172, William W. Ladd, as Receiver of the New York City Railway Company.

DEXTER, OSBORN & FLEMING,
Attorneys.

179 APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, as Receiver of the New York City Railway Company, substituted in place of former Receivers, Joline and Robinson,
GEORGE N. WHITTLESEY, of Counsel.

MERRILL & ROGERS, Solicitors for the Receiver,
ALFRED H. HOLBROOK, of Counsel.

By consent of counsel, adjourned to Saturday, December 5th, 1908, at 10:30 A. M.

180

New York, December 5, 1908. 181

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, as Receiver of the New York City Railway Company, substituted in place of former Receivers, Joline and Robinson,
GEORGE N. WHITTLESEY, of Counsel.
BOWERS & SANDS, Solicitors for Central Trust Company,
GEORGE W. DAVISON,
MIDDLETON S. BORLAND and 182
FREDERIC J. FULLER, of Counsel.
MERRILL & ROGERS, Solicitors for the Receiver,
ALFRED G. HOLBROOK, of Counsel.

Mr. Whittlesey: Before we proceed, Mr. Master, I wish to call the Master's attention to certain corrections which we agree shall be made in the stipulation which was spread upon the record at the last hearing.

On page 3001 of the record the total to September 24, 1907, should be $103,871.47, instead of 183
$103,871.67.

On page 3002, the second item on that page should be $7,934.71 instead of $9,820.76, and the footing immediately below should be $77,182.26; and the next footing, being the grand total charged by both the New York City Railway Company and its receivers should be $181,053.73.

On page 3003, strike from the eighth line from the end of the page the words "of the Third Avenue Railroad Company." The stipulation will then read, "It is stipulated that no demand was made by or on behalf of the Morton Trust Company," etc.

184 Now, it appears that the claim filed herein contains an error in computation of interest from the period from January 1st, to January 11th, inclusive, 1908, the amount of such interest being stated in the column as $10,912.73, and the correct figure being $9,026.58, thereby reducing the total of the debits charged against the defendant and the total of the claim by $1,886.12, and I ask leave to physically amend the claim, or that it be considered physically amended in that particular.

The Master: Application granted.

It is stipulated that the last payment of rent
185 under the lease made by the Third Avenue Railroad Company was made on July 13, 1907, and that the first default in the payment of rent occurred on the 13th day of October, 1907; that the last payment of interest on the bonds secured by the mortgage is for the interest that became due on July 11, 1907, and that the default in payment of interest on said bonds occurred on January 1, 1908.

The above stipulation may be referred to and used by the Master in Claim No. 70 of the Central Trust Company.

186

LEON C. BEUKERS, called as a witness on behalf of the Central Trust Company, being duly sworn, testifies as follows:

Direct-examination by Mr. Davison:

Q. What is your business, Mr. Beukers? A. My business is bookkeeper.

Q. And what was your business in April, 1907? A. My business at that time was also bookkeeper.

Q. And where were you employed as book-

keeper at that time? A. I was employed by the 187
Metropolitan Street Railway Company.

Q. And the New York City Railway Company? A. I think it was that name, too.

Q. What particular books did you have charge of? A. I had charge of the Forty-second Street Railroad Company and the Dry Dock Railroad Company books.

Q. Under whose direction were you working? A. I was working under the direction of Mr. Brown.

Q. The auditor of the New York City Railway Company? A. I cannot say that.

Q. You mean Mr. H. W. Brown? A. Yes. 188

Q. And you worked at 621 Broadway? A. Yes, sir.

Q. You made entries at his directions? A. Yes.

Mr. Whittlesey: Please do not lead the witness.

Mr. Davison: I may have to lead the witness, as he is not a willing witness.

Mr. Whittlesey: That does not appear yet.

Q. What books of the Forty-second Street road did you keep? A. The journal and ledger.

189

Mr. Whittlesey: There are two companies. Let it appear which company.

Q. The books which you kept were the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company books? A. Yes.

Q. How long did you continue to keep these books, Mr. Beukers? A. About four months.

Q. And do you remember the month in which you stopped keeping them? A. It was either July or August, I am not sure about that.

190 By Mr. Whittlesey:

Q. When you stopped? A. When I stopped.

Mr. Davison: He said he began in April, 1907.

By Mr. Davison:

Q. I show you Exhibit A of October 14, 1908, being General Ledger No. 2, of the 42nd Street road, and ask you whether that was one of the books you kept during this period (handing book to witness)? A. Yes, it is the ledger I kept.

191 Q. During the period that you have described for four months? A. Yes, sir.

Q. In making the entries in these books, where did you get the memoranda, from whom did you get it? A. Oh, I got it from different sources.

Q. Tell us. A. Sometimes from the bookkeeper of the New York City Railway Company, sometimes over the telephone from outside parties, and from bill clerks.

Q. By whom were you paid, Mr. Beukers? A. I think I was paid by the New York City Railway Company; I am not sure about it, though; I simply got my money.

192 Mr. Whittlesey: I move to strike it out.

Motion granted.

By the Master:

Q. Don't you know by whom you were paid? A. No, I simply got my money at the end of the month.

Q. You got it in cash? A. I got it in cash, yes.

Q. From whom, from what individual? A. I got it from the cashier of the New York City Railway Company.

By Mr. Davison: 193

Q. I also show you Exhibit B of October 14, 1908, which is a general journal (handing book to witness)? A. Yes, this is one of the books I kept.

Q. Is that one of the books that you kept for the 42nd Street Railway at the time of your employment on the books? A. Yes, sir.

Q. And you kept it under the same direction? A. Yes.

Mr. Davison: Will you admit Mr. Brown was the auditor of the New York City Railway Company, or do you want me to prove it?

Mr. Whittlesey: Yes, Mr. Brown was the auditor of the New York City Railway Company for this period. 194

Mr. Davison: And he continued as such down to the 24th of September. I have got another witness here to cover the rest of the time.

Q. Can you tell me who kept the cash book of the 42nd Street Railway Company during that period? A. No, not absolutely.

Q. I show you the cash book, Exhibit C of October 14th. Will you look at it and see if it refreshes your memory as to who kept it (handing book to witness)? A. Yes, this is the cash book used at that time. 195

Q. Do you know who kept it? A. No, I do not.

Cross-examination by Mr. Whittlesey:

Q. In the general ledger to which you have testified here, are the entries during the period that you have been speaking of in your handwriting, these entries? A. Yes.

Q. These entries here are in your handwriting? A. Yes, in my handwriting.

196 Q. How long have you been a bookkeeper? A. Well, I have been a bookkeeeper— Before that time?

Q. Yes. A. About two years on the other side, in the other country, in Europe.

Q. Did you ever take a course in bookkeeping, study bookkeeping? A. Yes.

Q. So far as you know and to the best of your knowledge and ability as a bookkeeper at that time, you kept these books, the ledger and journal to which you have testified, correctly, did you? A. Yes.

197 Q. Did you have the exclusive charge of the keeping of this ledger and this journal to which you have testified during this period? A. Yes.

Q. You say you got some of your memoranda, some of the data which you put into these books, from outside sources? A. Yes, that is right.

Q. Do you mean to say that a bill or voucher would come in from outside sources and you would enter it up? A. No, I got it through the telephone or from the bill clerk that a certain amount was collected or to be collected.

Q. And entered it accordingly? A. And entered it accordingly.

198 Q. The journal has statements that refers to vouchers. Did you see those vouchers? A. The journal, no, we kept a voucher register.

Q. Did you keep the voucher registers? A. No, sir, I did not.

Q. You did not keep the voucher register? A. No, sir.

Q. The voucher register of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. No, sir, I did not keep that.

Q. That is the voucher register you are speaking of? A. No, sir, that is not the voucher.

Q. I say the voucher register you are speaking of was the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company register? A. Yes, sir. 199

Q. You did not keep that? A. No, sir.

Q. Did you make entries from that in to your journal? A. Yes, sir, a similar entry.

Q. Are the footings in this ledger during the period for which you kept the books correct? A. So far as I know, yes.

Q. You checked them and verified them when you made them? A. Yes, sir.

Q. Carefully? A. Yes, sir. 200

By the Master:

Q. Who was your immediate superior? A. At that time?

Q. Yes. A. Well, I think the chief clerk was, and there were two chief clerks at that time, I think.

By Mr. Whittlesey:

Q. What were their names? A. Boone was the name; I do not know his first name. He is not employed any more now. I think the other chief clerk came under that man, and it does not apply to that period at all. 201

By Mr. Davison:

Q. They were employed entirely by the Railroad Company as clerks? A. Yes, sir.

By Mr. Whittlesey:

Q. The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, the Metropolitan Street Railway Company, the Dry

202 Dock Railroad Company or the New York City Railroad Company? A. No, not particularly.

Q. You did not employ them; they were superior to you? A. Yes, they were superior to me. They were employed by either the New York City or the Metropolitan.

Q. Do you know that? A. Yes, sir.

Q. How do you know that; do you know they were not employed by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. Yes, I know.

Q. How do you know that? A. Because they
203 were not paid by them.

Q. How do you know that? A. Well, I have seen the cash book several times.

Q. They were paid generally? A. Yes, sir, they were paid in the same way that I was paid.

By the Master:

Q. Do you know whether all the employees there were employed the same way in the bookkeeper's department and auditor's department? A. Yes, sir.

Q. Was there more than one department? A. Yes, sir, claim department, and others.

204 Q. Were there separate departments for the separate railways? A. No, sir. There was only one department for all the railways together.

Q. Did you work on the books of any other railway company except the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. Yes, sir, I worked on the Union.

Q. On what? A. On the Union Railway, Yonkers, Tarrytown, Westchester and Southern Boulevard.

By Mr. Davison: 205

Q. And the Dry Dock Railroad Company? A. I have told that before.

By the Master:

Q. You worked on the books of the Dry Dock Railroad Company? A. Yes, sir, at the same time as I worked on the 42nd Street.

By Mr. Davison:

Q. Do you know if these chief clerks worked under the direction of Mr. Brown? A. Yes. 206

By the Master:

Q. Was Mr. Brown the head of the whole outfit there? A. I could not tell you that.

By Mr. Davison:

Q. In this same bookkeeping department, the books of what other railroad companies were kept, if you remember? A. In that same auditor's office?

Q. Yes. A. As I told you I kept the books of the Union— 207

Q. Any other than those you have named, if you remember? A. The New York City Railway Company.

Q. Second Avenue, Central Park? A. That was another division, the Second Avenue was another division of the Metropolitan Street Railway Company; the Metropolitan Street Railway Company were kept there too.

By the Master:

Q. Were or were not? A. Were.

208 Q. Did you have anything to do with the books of the New York City Railway Company? A. No, sir.

By Mr. Whittlesey:

Q. You never saw them, did you? A. Oh, I saw them.

Q. But you had nothing to do with them? A. Nothing, no, sir.

By the Master:

Q. Did the 42nd Street, Manhattanville and St.
209 Nicholas Avenue Railroad Company have an auditor of its own, so far as you know; do you know whether it did or not? A. No, I do not think it had.

By Mr. Whittlesey:

Q. You do not know whether Mr. Brown was also auditor for the 42nd Street road? A. I have stated I do not know whether Mr. Brown was auditor or not.

By the Master:

210 Q. Was Mr. Brown the head of the whole office? A. I testified I did not know about that.

By Mr. Davison:

Q. You testified a moment ago something about this being the auditor's office? A. Yes.

Q. Who was in charge? A. I cannot tell you that.

Q. You do not know who gave you orders? A. No, sir.

Q. Was your work done in Mr. Brown's office?

A. Mr. Brown was around there, yes; he was around sometimes. He had a separate office, though. 211

By Mr. Davison:

Q. You mean a private room? A. A private room.

By the Master:

Q. Were the books of these other railroads upon which you worked in the same room with the 42nd Street Railroad Company books? A. They were in the same room, yes. 212

By Mr. Davison:

Q. By whom were the vouchers signed that were given to you to enter? A. From the 42nd Street Railroad?

Q. Yes. A. As I recollect, it was by Mr. Brown.

By Mr. Whittlesey:

Q. You say you think the vouchers were signed by Mr. Brown? A. I say as I recollect.

Q. All of them? A. Yes, all of them.

Q. Were not some of them signed by Mr. Brown and some of them signed by other people? A. I do not think they were; I think they were all signed by Mr. Brown. 213

Q. But some of the directions which you got for the entries which you made in your books came from other people besides Mr. Brown? A. Oh, yes, from his representative.

Q. You knew he was his representative, did you? A. Yes, sir, he was the assistant.

214 By the Master:

Q. Was there anybody in the whole office that was not subject to the directions of Mr. Brown, so far as you know? A. I think they were all subject to the direction of Mr. Brown.

Q. Everybody in the department? A. Yes. I am not sure about his being auditor, because I think—I am not sure whether he was auditor or comptroller, that is the idea.

Q. He was the head. Was there anybody over him in that department? A. I do not know that.

215 Mr. Davison: They have admitted he was the auditor, and that is the thing.

William John Bradley, called as a witness on behalf of the Central Trust Company, being duly sworn, testifies as follows:

Direct-examination by Mr. Borland:

Q. Where are you employed now, Mr. Bradley? A. 65th Street and Third Avenue.

Q. By whom? A. At present by the Dry Dock
216 Railroad Company and the 42nd Street Railroad Company.

Q. That is, you are keeping those books at this time? A. No, sir.

Q. What are you doing there? A. I am a clerk. I am not touching the books.

Q. Under whose directions are you working now? A. At present I could not just say. Mr. Martin, he is the assistant auditor.

Q. Who is the auditor? A. Mr. Farrington, but he is not in the office at the present time.

Q. You mean he is away for two or three days? A. For two or three weeks.

Q. On a vacation? A. I could not say. 217

Q. Before you went to 65th Street and Third Avenue, where did you work? A. 177 Manhattan Street.

Q. And how long were you there? A. Five or six days.

Q. And what office did you go to at Manhattan Street? A. I left 621 Broadway to go to Manhattan Street.

Q. What office at 621 Broadway did you leave to go to Manhattan Street? A. Auditor's office.

Q. What office was it at Manhattan Street that you worked in? A. We went up there, we had 218
the books and things up there, there was no work going on. There was an office set aside there.

Q. I asked you what office at Manhattan Street it was you worked in, what building was it? A. The superintendent's building of the 42nd Street Company.

Q. That is the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Q. That was in their building at 177 Manhattan Street, was it? A. Yes, sir.

Q. And you went there from 621 Broadway? A. Yes, sir.

Q. From the office of the Metropolitan Street 219
Railway Company? A. From the New York City Railway Company.

Q. How long did you work in the New York City Railway Company office? A. On the Dry Dock books or the New York City books?

Q. How long did you work there? A. I worked there from February 1, 1907, to January 26, 1908.

Q. On January 26, 1908, was the time you moved to the Manhattan Street office with the books of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company; is that right? A. Yes, sir.

220 Q. From the period from February 1, 1908, to the date in January, 1908, in which you moved, what work did you do in the New York City Railway Company office, if any? A. From February 1, 1907, until about September 30th, I worked on New York City work, and the remaining time I spent on the Dry Dock Company work.

Q. When you say you spent it on the Dry Dock Company work, what work was that? A. I was bookkeeper of the books of both companies.

Q. You kept the books of both of these companies? A. Yes, sir.

Q. Who was your predecessor? A. Mr. Beukers.

221 Q. That is the witness who has just testified? A. Just left.

Q. What books did you keep prior to the date in August you testified you kept the books? A. I was an ordinary detailed clerk on the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Q. Who did you get your orders and directions from? A. On the New York City work?

Q. Yes, and on the 42nd Street and Dry Dock Company work, too? A. On the New York City work it came under Mr. Brown, or the chief clerk,

222 and the rest of the work came indirectly under Mr. Brown, either Mr. King or Mr. Gray.

Q. And who were Mr. King and Mr. Gray? A. Mr. Gray, as I understand, he was a general bookkeeper; he supervised all the bookkeeping of all the companies.

By the Master:

Q. Of all the railroads? A. Of all the railroads.

By Mr. Whittlesey: 223

Q. Do you now that; do you know what he did? A. I know he O. K.'d all the vouchers, all the journal vouchers.

Q. The journal vouchers you entered were O. K.'d by Mr. King? A. Yes, sir.

By the Master:

Q. Do you know whether he was in Mr. Brown's employ or not? A. None of Mr. Gray's salary was charged to that company, so it must have come.

224

Mr. Whittlesey: I move to strike that out. Motion granted.

By Mr. Borland:

Q. Mr. Gray and Mr. King were both in the employ of the New York City Railway Company, were they not? A. At the time Mr. King came he was hired by the New York City Company from another firm, but he supervised the New York City work and also my work.

Q. He was actually in the New York City auditor's office at 621 Broadway? A. His services were paid for by the New York City and he was actually there. 225

Q. I asked you the place where he did his work; was it in the New York City office? A. In the auditor's office.

By the Master:

Q. Did he have anything to do with the books of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. He would O. K. the journal books.

Q. Were the men actually working on the books subject to his directions? A. Yes, sir.

226 By Mr. Borland:

Q. What was the plan in the auditor's department of the New York City Railway Company, what was the layout of the place there? A. According to the size or men?

Q. What was there, was there a general office? A. This was a general office. Four Companies were in the one office.

Q. There was one general office where the bookkeepers worked? A. All one.

Q. And Mr. Brown had a private room, did he? A. Yes, sir.

227 Q. And that was in the same suite? A. That was in the same suite.

Q. And the private office and the general office together composed what was known as the auditor's department? A. I know our general office was, I do not know what they call Mr. Brown's office or Mr. Brown or the auditor's office.

Q. The large room in which you worked with the bookkeepers, is that what was known up there as the auditor's department of the New York City Railway Company? A. To the best of my knowledge it was; I do not know of any other

228 auditor's office.

By the Master:

Q. That is what I was going to ask you, whether there was any other auditor's or bookkeeping department, so far as you know? A. No, sir.

By Mr. Borland:

Q. Who worked in this general office with you, what other bookkeepers, if you know? A. There was Mr. Beukers, Mr. Hudson.

By the Master: 229

Q. What books did Mr. Hudson work on? A. He was on the New York City books.

By Mr. Borland:

Q. Did Beukers leave the New York City office in August when you took the Dry Dock Company, and the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company books? A. When he left the 42nd Street and Dry Dock Company he continued on the Union Railway Company books.

Q. And they were kept at 621 Broadway? A. 230
They were kept at 621 Broadway.

Q. In other words he left the journal and ledger of the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company, and was assigned to do the work in the Union Railway Company, is that right? A. Yes, sir.

Q. And in making your entries in the Dry Dock Railroad Company's books and the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company while there, where did you get your instructions, other than the vouchers you claim were O. K.'d by Mr. King and Mr. Gray? A. I made the vouchers before they came. 231

Q. That was part of your duties as bookkeeper of the Dry Dock Railroad Company and the 42nd Street road? A. Yes, sir.

Q. Where did you get the information to make the vouchers from? A. From the necessary pay rolls and whatever stock there was.

Q. Who audited the vouchers? A. Mr. Brown audited the vouchers.

Q. Who employed you when you went to 621 Broadway? A. Mr. Brown.

232 By Mr. Whittlesey:

Q. Personally? A. Well, Mr. Brown and Mr. Moorhead. I went to see Mr. Brown and Mr. Moorhead was there and he questioned me, although my letter came from Mr. D. C. Moorhead.

By Mr. Borland:

Q. Who is Mr. Moorhead; who was he at that time? A. I would not know what to call him. He had some office there.

Q. You do not know what his title was? A. I do not.

233 Q. Was he in the auditing department? A. That I could not say. He was there, but he was in another room than what you call the auditor's department. If I understand correctly, Mr. Moorhead O. K.'d some large vouchers.

Q. Occasionally the vouchers you entered were O. K.'d by Mr. Moorhead?

By the Master:

Q. Do you know what Mr. Moorhead's relations were to Mr. Brown? A. Not with respect to Mr. Brown.

234 Q. Do you know whether he was employed by Mr. Brown? A. No, sir, I do not.

Q. Do you know whether they were working in the same department? A. No, sir.

Q. Do you know what Mr. Moorhead's duties were? A. No, sir. When I went there he was in the office about three or four days and he O. K.'d a few vouchers, to my recollection.

By Mr. Borland:

Q. Did any one O. K. vouchers for you other than Mr. Moorhead and Mr. Brown? A. Mr. King and Mr. Gray O. K.'d them.

Q. I should not say O. K.'d, I mean audit the vouchers? A. Audited the vouchers, yes, sir, nobody else but those two. 235

By Mr. Whittlesey:

Q. Who signed the pay rolls from which you took your entries? A. The payment?

Q. Yes. A. Orren Root, through his clerk.

Q. What were the books that you kept; that has not been brought out? A. Those are the only books I have worked on.

Q. You mean the journal and ledger? A. Yes, sir, No. 2, of both companies.

Q. The journal and ledger? A. Yes, sir. 236

Q. I am not interested in the Dry Dock. The journal and ledger? A. Yes, sir, the journal and ledger.

Q. The entries you made, to the best of your ability, so far as you could, were correctly made, were they? A. Yes, sir.

Q. You never intentionally made any entries that were not correct? A. Oh, no, sir.

Q. The footings were made accurately, were they? A. To the best of my knowledge they were.

Q. In other words, you kept the books correctly, so far as in you lay? A. Yes, sir. 237

Frederick J. Fuller, called as a witness on behalf of the Central Trust Company, being duly sworn, testifies as follows:

Direct-examination by Mr. Davison:

Q. What is your business, Mr. Fuller? A. I am an attorney and counsellor at law.

Q. And you are connected with the firm of Bowers & Sands? A. I am.

238 Q. You are familiar with the litigation concerning the Third Avenue Railroad Company? A. I am.

Q. Do you remember serving a demand upon Mr. Joline, signed by the Central Trust Company?

Mr. Whittlesey: You better let him state.

Q. State the circumstances in connection with the service of a demand on behalf of the Central Trust Company concerned the notes of the so-called controlled road? A. I had a typewritten demand signed by the Central Trust Company by James M. Wallace, President. It demanded that
239 Adrian Joline and Douglas Robinson, as receivers of the New York City Railway Company, turn over to the Central Trust Company a certain note made by the 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company to the New York City Railway Company and certain other notes made by various other controlled companies to the New York City Railway Company—be turned over to the Central Trust Company. I took this demand and went up to 621 Broadway, saw Mr. Joline, who was then with Mr. Masten; I went in and handed it to Mr. Joline and stood
240 there while he read it, and he turned it over to Mr. Masten. That was in the latter part of April or the early part of May, 1908, to the best of my recollection. I went back to the office and took a copy which I had there and attached to it an affidavit of service.

By the Master:

Q. Did Mr. Joline or Mr. Masten ever acknowledge receipt of the demand. A. Not that I know of.

Q. Did they ever take action on the demand? A. Not that I know of.

No Cross-examination.

Case submitted, without prejudice, to a motion to reopen. 241

Briefs to be submitted by Monday, December 14, 1908.

New York, April 28, 1909.

APPEARANCES:

MERRILL & ROGERS, Solicitors for Frederick W. Whitridge, Receiver of The 42nd Street, Manhattanville and St. Nicholas Avenue Railroad Company.

BOWERS & SANDS, Solicitors for Central Trust Company, GEORGE W. DAVISON, of Counsel. 242

KELLOGG & ROSE, attorneys for complainant, MACINTOSH KELLOGG, of Counsel.

SELDEN BACON, attorney for William J. Haley and others, intervenors.

The Master: This is a hearing on a motion to re-open, and that Mr. Bacon's client or clients be allowed to be heard on behalf of himself and all others that want to come in.

Mr. Bacon: I may add to that I have been substantially advised by other creditors holding about $30,000 of claims that they will work with me in the matter. 243

Mr. Kellogg: We will join with you in the matter.

Mr. Bacon: I have not any specific retainer from these other parties.

The Master: Claim No. 172 was under consideration at the time I was informed that this application might be made. I completed my consideration of that claim and came to the conclusion

244 that the same should be disallowed *in toto,* as I announced formally on the hearing held yesterday. That claim having been disallowed, there would seem to be no reason for the application made to open the same, and the application with respect to Claim No. 172 is therefore denied. If all the parties should agree that more testimony would be desirable, if it could be opened.

Mr. Bacon: I would not ask that it be opened under those circumstances. I would only ask that we be allowed to intervene so if there is any appeal from the Master's decision we could be heard in connection with that.

245 The Master: Is there any objection to that?

Mr. Davison: No.

The Master: The application as modified is accordingly granted, and Mr. Bacon's appearance for his client, Mr. William J. Haley, will be noted upon the record as a party entitled to be heard in any further proceedings that may be had in that claim.

Mr. Kellogg: I want to join in that on behalf of the Barber Asphalt Company, the complainant.

It is agreed that printed copies of the First Consolidated Mortgage of the Third Avenue Rail-

246 road Company to the Morton Trust Company, as Trustee; of the lease of the Third Avenue Railroad Company to the Metropolitan Street Railway Company; and of the lease of the Metropolitan Street Railway Company to the New York City Railway Company, submitted to the Master, be used by him as the exhibits therein in the place and stead of the originals.

UNITED STATES CIRCUIT COURT, 247

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendant. 248

Report of Edwards H. Childs, Special Master, on Claim No. 172, of William W. Ladd, Receiver of the New York City Railway Company.

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES:

I, Edwards H. Childs, Special Master, to whom by decree made and filed herein on the 8th day of February, 1908, it was, among other things, referred "to take proof of all claims and demands" 249 against the above named defendant, do hereby respectfully make this separate report upon the claim of William W. Ladd, as Receiver of the New York City Railway Company, filed with me pursuant to said decree.

The claim was originally filed by Adrian H. Joline and Douglas Robinson, as Receivers of said New York City Railway Company, on the 8th day of May, 1908, the time to file the same having been extended by special orders of this

250 Court. Thereafter and by order of this Court, bearing date the 24th day of July, 1908, and filed in the office of the Clerk on the 27th day of July, 1908, William W. Ladd was duly appointed Receiver of said Company in the place and stead of said Adrian H. Joline and said Douglas Robinson and was duly substituted as the claimant in this proceeding.

Objections to the allowance of the claim having been filed by the Receiver of the defendant Company and by the Central Trust Company, as substituted Trustee of the "First Consolidated Mort-
251 gage" of the Third Avenue Railroad Company, the claim was duly brought on for hearing before me pursuant to notice duly given to all parties. A large number of hearings were had and I was attended by attorneys and counsel as follows:

For the original claimants, Joline and Robinson, as Receivers, by Messrs. Masten and Nichols, with Mr. W. M. Chadbourne, of counsel.

For the substituted claimant, William W. Ladd, as Receiver, by Messrs. Dexter, Osborn and Fleming, with Mr. Matthew C. Fleming and Mr. George N. Whittlesey, of counsel.

For the Receiver of the defendant Company, by
252 Messrs. Merrill and Rogers, with Mr. Alfred H. Holbrook, of counsel.

For the Receiver of the Third Avenue Railroad Company, by Messrs. Merrill and Rogers, with Mr. Alfred H. Holbrook, of counsel.

For the Central Trust Company, as substituted Trustee of the "First Consolidated Mortgage" of the Third Avenue Railroad Company, by Messrs. Bowers and Sands, with Mr. George W. Davison and Mr. Leonce Fuller, of counsel.

I proceeded to take the proofs submitted by the parties and to hear arguments thereon, and upon the proofs so taken, I find and report as follows:

The claim consists of two separate parts, first, 253
a claim for the balance alleged to be due upon an open account, and, second, a claim upon a promissory note in the sum of $893,433.30. The claimant contends that he has made a case for the recovery of the sum of $107,830.54 upon the open account, that he has proved his right to recover on the promissory note and that the claim should be allowed in the total sum of $1,001,263.84. The two parts of the claim require separate consideration.

The Claim on Open Account. 254

The claimant sought to prove the balance due upon this account by the books of the defendant which were produced pursuant to a subpœna *duces tecum*. It appears from said books that the defendant credited the New York City Railway Company, and its Receivers from the time of their appointment on September 24th, 1907, with interest on a certain promissory note in the sum of $6,491,967.44, dated April 30th, 1907, made by the defendant to the order of the Morton Trust Company, as Trustee of the Third Avenue Railroad Company's mortgage of May 15th, 1900, 255
and endorsed to and held by the Central Trust Company, as the substituted Trustee under said mortgage. These credits cover the period from April 30th, 1907, the date of the note, to the time when the Receiver of the Third Avenue Railroad Company took possession of its property, that is, up to January 12th, 1908; they amount to the sum of $181,053.73 (S. M., pp. 3001, 3002, 3277), and were included in the account, which shows the balance due to be $107,830.54. The Receiver of the defendant and the Central Trust Company, as

256 Trustee of the Mortgage and holder of the note in question, dispute these credits and contend that the New York City Railway Company was not entitled to the interest on the note. The amount credited therefor exceeds the balance claimed and if the interest was not payable to the New York City Railway Company, the balance would be against the claimant and the claim on open account would fail. It is accordingly necessary to examine the facts upon which the claim for interest is based.

The Third Avenue Railroad Company being the
257 owner of a majority of the stock of the defendant, as well as a majority of the stock of certain other "Controlled Companies," made its "First Consolidated Mortgage" to the Morton Trust Company, as Trustee, on May 15th, 1900, and pledged its stock in the Controlled Companies as security for the mortgage (S. M., p. 2795).

By an instrument dated April 13th, 1900, and subsequently executed and delivered, the Third Avenue Railroad Company leased all of its property to the Metropolitan Street Railway Company and transferred its stock in the Controlled Companies to the lessee subject to the pledge
258 thereof under the mortgage above referred to. The lessee guaranteed the payment of the mortgage bonds and in general succeeded to all property and rights and all obligations of the lessor.

Subsequently and by an instrument dated February 14th, 1902, the Metropolitan Street Railway Company leased all of its property and rights of every kind to the Interurban Street Railway Company and transferred to the lessee the ownership of the stock acquired by it under its lease from the Third Avenue Railroad Company, subject again to the lien of the mortgage to the Morton Trust Company. The name of the In-

terurban Street Railway Company was thereafter changed to New York City Railway Company, and the Receiver of that Company is the claimant in this proceeding. 259

At a meeting of the Board of Directors of the defendant, held on June 27th, 1907, a "Plan for Settlement of Construction Liabilities as of April 30th, 1907," was presented in which it was stated that on the date named the defendant was indebted to the Third Avenue Railroad Company in the sum of $6,303,483.53, to the Metropolitan Street Railway Company in the sum of $46,477.13 and to the New York City Railway Company in the sum of $42,006.78, or in the total sum of $6,391,967.44 to the three companies. It was also stated that in June, 1903, the defendant had received a credit of $100,000.00 from the Third Avenue Railroad Company to correct a supposed error made in April, 1901, that this in itself was an error and that the amount should be added to the indebtedness to the Third Avenue Company. It was further provided that the liabilities to the Metropolitan and the New York City Companies should be assumed by the Third Avenue Company and the debt to that Company was thus finally fixed at the total sum of $6,491,967.44. The directors of the defendant then authorized the making and delivery to the Third Avenue Railroad Company of a promissory note in said sum to be dated April 30th, 1907, and to bear interest at the rate of four per cent. per annum from date, payable on July 1st and January 1st in each year. While the note represented the amount agreed upon as due the Third Avenue Railroad Company and the resolution provided that it should be delivered to that Company, it was nevertheless provided that the note be made payable to the Mor- 260 261

262 ton Trust Company, as Trustee of the Third Avenue Railroad Company's mortgage and fall due on January 1st, 2000, or the earlier maturity of the bonds issued under the mortgage. The mortgage provided at page 43 that "all claims against Controlled Companies" should be held by the Railroad Company as security for the bonds and should be assigned to the Trustee at any time on demand. Had the note then been payable to the Railroad Company, it would have held the same for the benefit of the Trustee of the mortgage, and the provision that it be made payable directly
263 to the Trustee was adopted as a short cut. The note was duly made and delivered in accordance with the above provisions and come into the hands of the Morton Trust Company, as Trustee.

Thereafter the Central Trust Company was substituted as Trustee of the mortgage in the place and stead of the Morton Trust Company and the note in question was duly endorsed and transferred to the substituted Trustee. The Central Trust Company, as such Trustee, is now the holder of the note and has made a separate claim thereon for the principal and interest, which claim is pending before me and is No. 70 upon the
264 list of claims filed with me as Special Master. The note is involved in the claim now under consideration simply to the extent of deciding whether or not the New York City Railway Company was entitled to interest thereon. On behalf of the claimant, it is contended that by virtue of the leases the rights of the New York City Railway Company in respect to this note were the same as the rights of the Third Avenue Railroad Company would have been had the leases not been made, that the question is between the rights of the mortgagor and the rights of the Trustee of

the mortgage, that while the note was properly 265
delivered to the Trustee, it was nothing but a pledge and that, until default, the pledgor was entitled to collect the interest on the note pledged. The following provision on page 41 of the mortgage is relied upon to support this contention:

> "So long as there shall be no default in the payment of the principal or interest of the bonds hereby secured, the Metropolitan Company or the Railroad Company, as the case may be, may unless the Trustee shall otherwise direct, collect and receive all dividends, interest and increase now or hereafter payable upon said shares of stock of * * * The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company * * *." 266

But this relates only to "dividends, interest and increase" on "shares of stock" pledged under the mortgage and is not absolute even as to that because the Trustee had power to "otherwise direct." The provision would seem rather to recognize the rule that in the absence of an expressed intention to the contrary, the pledgee may collect the interest on property pledged and credit the same to the pledgor and to make an exception to the rule in the case of shares of stock. 267
(See Jones on Pledges and Collateral Securities, 2nd Ed., §§ 398, 399.) Being an exception, it cannot be extended beyond its terms. The mortgage is silent upon the subject of interest on notes except for the implication involved in the provision under which the note in question went to the Trustee. The mortgagor was bound to transfer to the Trustee upon demand "All claims against controlled companies" and "all claims" include, of course, those bearing interest. The claim against the defendant was reduced to the

form of a promissory note bearing interest at the rate of four per cent. from its date and in accordance with the creditor's obligation to transfer the claim to the Trustee as additional security, the note was made payable directly to the Trustee, and the promise to pay interest from date was just as much a part of the claim as the promise to pay the principal.

What the Trustee got was the mortgagor's "claim" against the defendant, which is precisely what it was entitled to under the mortgage. The claim took the form of an interest-bearing promissory note, and I am unable to separate the interest from the principal.

The claimant contends, however, that no interest was in fact collected by the Trustee, that the charge of interest by the New York City Railway Company, the corresponding credits and some actual payments on account made by the defendant (S. M., p. 3002) were acquiesced in by the Trustee and constitute a practical construction of the mortgage by the parties or a waiver by the Trustee. While the note was dated April 30th, 1907, it was not actually issued until after the directors' meeting held on June 27th, 1907. The Receiver of the Third Avenue Railroad Company was appointed on January 6th, 1908, and the Receiver of the defendant was appointed on February 1st, 1908. I think the Trustee lost no rights in failing to collect interest on the note in the meantime. The interest was payable semi-annually, July 1st and January 1st, by the terms of the note, but it was charged by the New York City Railway Company and credited by the defendant monthly. In making these charges, the New York City Railway Company relied, of course, wholly upon its lease, for there was no other foun-

dation whatever upon which it could claim under 271
the Third Avenue Railroad Company. Its Receivers did not adopt the lease (S. M., p. 3006) but nevertheless continued to make monthly charges for this interest, disregarding the fact that they could not repudiate the burdens and at the same time continue to receive the benefits under the instrument. There is no evidence that the Trustee knew of these monthly charges and credits and it is not charged with knowledge of any deviation from the terms of the note itself.

For the purpose of this discussion, I have assumed that the note represents a valid claim and 272
in considering whether the obligation expressed on the face of the note itself was at variance with the provisions of the mortgage, I have assumed that the Central Trust Company is not an innocent holder. The rights of that Company as the holder of the note, however, will be determined in its own case, and in the case at bar, I find simply that even if the note is valid and even if the holder is charged with knowledge of all the relations of all parties, that the interest runs with the note and that the New York City Railway Company was at no time entitled thereto. As the amount claimed for interest is credited on the 273
open account and exceeds the balance due thereon, the claim upon that account must be disallowed.

On behalf of the defence, it was further objected that the entries in the defendant's books by which the account was proved were deprived of any probative force as admissions against interest upon its being shown that the New York City Railway Company owned a majority of the defendant's stock and was thus in control and that its books, while separately kept, were (with the books of other "Controlled Companies") in one

274 general department under the general supervision of the Auditor of the New York City Railway Company. In view, however, of the fact that the finding already made disposes of the entire claim on open account, it is unnecessary to consider any further objection, or any further questions upon this branch of the case.

The Claim on Promissory Note.

From the minutes of the meeting of the Board of Directors of the defendant Company held on June 27th, 1907, and above referred to, it appears
275 that the "General Balance Sheet—April 30th, 1907," which was before the meeting, contained under the heading "Liabilities" and the sub-heading "Accrued Accounts and Reserves," a statement that the defendant was indebted to the New York City Railway Company in the sum of $893,433.30 (S. M., pp. 2781-2783) and it further appears from said minutes that the directors passed a resolution authorizing and directing the proper officers of the Company "to execute, issue and deliver demand notes of this Company, payable to bearer or otherwise, bearing interest at
276 the rate of four per cent. per annum to cover the operating indebtedness of this Company as shown in said balance sheet" (S. M., p. 2786). The claimant having proved these facts, produced a demand note of the defendant Company, signed by the proper officers thereof, dated April 30th, 1907, and payable to the order of the New York City Railway Company in the sum of $893,433.30 with interest at four per cent. The note was offered and received in evidence (S. M., p. 2770); it was conceded that no part of the principal thereof had been paid and the claimant rested upon the

prima facie case thus made. Interest on this 277
note (in addition to interest on the larger note of the Central Trust Company above considered) had been charged by the New York City Railway Company up to September 24th, 1907, and by its Receivers thereafter and had been credited by the defendant upon the open account and as the claimant has already been shown to be upon the wrong side of that account, we are concerned here with the principal of the note only. By way of defense to this claim on the note, the mortgage made by the Third Avenue Railroad Company to the Morton Trust Company, as Trustee, dated 278
May 15th, 1900, the lease of the Third Avenue Railroad Company to the Metropolitan Street Railway Company, dated April 13th, 1900, and the lease of the Metropolitan Street Railway Company to the Interurban Street Railway Company (now the New York City Railway Company), dated February 14th, 1902 (all above referred to), were offered and received in evidence without objection (S. M., p. 2795), and it was then contended that the provisions of the mortgage were binding upon the New York City Railway Company, that the claim in question existed in violation of those provisions and should for that reason 279
be disallowed.

At the bottom of page 67 and at the top of page 68 of the mortgage, it is provided that:

> "All the covenants, stipulations, promises and agreements in this indenture contained by or on behalf of the Railroad Company * * * shall bind and apply to the successors and assigns of said Railroad Company, whether so expressed or not. Every such successor and assign shall possess and may exercise each and every right and power of the Railroad Company hereunder; but every

280 such successor * * * and every corporation to which the property, franchise and premises of the Railroad Company may be conveyed, transferred or leased, shall as a condition of such * * * conveyance, transfer or lease, be bound to observe and perform each and every covenant, stipulation, promise and agreement hereof as fully and completely as if it had itself executed this indenture as party of the first part hereto and had thereby expressly agreed to observe and perform the same."

281 The lease to the Metropolitan Street Railway Company had been arranged when the mortgage was drawn and the fact is expressly stated in the Mortgage on page 10 thereof. Then in the lease itself, the mortgage is expressly referred to (page 5); the lessee took all the property and rights of the lessor subject to all "burdens and conditions" (page 3) and expressly guaranteed the payment of the mortgage bonds (page 13). It is thus perfectly clear that when the lease was delivered, all obligations of the Third Avenue Railroad Company under the mortgage became binding upon the Metropolitan Street Railway Company. In the

282 lease subsequently made to the New York City Railway Company, the first lease was recited and the mortgage was referred to on page 43 thereof. All "benefits and rights" arising from the first lease were transferred to the lessee subject to all "burdens and conditions," on page 46. Then further, and toward the bottom of page 48, the lessee expressly assumed "all the obligations of the lessor under all such leases," with certain exceptions in respect to the principal of funded obligations which are of no importance in this proceeding. The New York City Railway Company had

actual notice of the mortgage and on page 55 of 283
the lease, where the ownership of a majority of the defendant's stock was transferred, the transfer was expressly made "subject to the prior lien of the mortgage * * *." I think it is clear that the covenants made by the Third Avenue Railroad Company in the mortgage and which relate to the "Controlled Companies" became binding upon the New York City Railway Company when the lease was accepted and the control of these companies passed to it and the effect thereof upon the claim under consideration must be determined.

It is urged that the creation of this indebted- 284
ness was in direct violation of the provisions of the mortgage and its general scheme, which was that the Controlled Companies should be kept practically free from debt, to the end that the value of the stock as collateral might be protected and the provision on page 34, in which the Railroad Company "agrees, covenants, and guarantees that no indebtedness of any of said Controlled Companies (except the current operating debt incurred in the ordinary course of business) shall be created," and the provision at the
end of page 35 and top of page 36 that "if any 285
company of whose capital stock a majority is now pledged hereunder * * * shall (otherwise than is herein provided) create or suffer to be created * * * any indebtedness other than indebtedness to the Railroad Company or for the current operating expenses of such company for a period not exceeding six months, then the Railroad Company will pay and discharge the same" are particularly relied upon. These provisions would seem to refer to indebtedness to third parties and I do not understand them to mean that

286 the Controlled Companies shall not become indebted to "the Railroad Company," because such indebtedness is expressly contemplated in the provision last quoted and because separate provision is made elsewhere for the disposition of "all claims against Controlled Companies." But, however that may be, the covenants in the mortgage ran to the Trustee and the defendant Company was not a party or privy thereto. If it should appear that a lawful debt had been created against a Controlled Company in violation of these provisions the Trustee would have its rem-
287 edy, but such a violation would be no defense in favor of the Company against which the debt had been created. The holder of the majority of the stock of a corporation and the corporation itself are two separate and distinct legal beings and when the corporation is sued by its majority stockholder upon a claim that is otherwise lawfully due, it is no defense that the plaintiff had agreed with an outside third party not to create the claim,—the corporation not having been a party to the agreement and the agreement having been made for the benefit of the third party rather than for the benefit of the corporation.

288 The claim under consideration represents an alleged indebtedness of one of the "Controlled Companies" to the successor of "the Railroad Company" and may or may not be an indebtedness contemplated by the mortgage. In any event it is a claim against a Controlled Company and clearly falls within the express provision of the mortgage above referred to, with respect to such claims. That provision, of course, as well as the others, ran to the Trustee of the mortgage and not to the defendant, but the Trustee is in Court, the mortgage is in evidence, the Court has

equity jurisdiction, and the rights of the Trustee, 289
if any, with respect to the claim in question, and as against the claimant, may be determined.

The Trustee made a demand upon the Receivers of the New York City Railway Company that the note upon which the claim under consideration is based be "turned over" to it (S. M., pp. 3299, 3300) and thus sought to obtain the benefit of the provision in question which is on page 43 of the mortgage and which reads as follows:

> "All claims against Controlled Companies now held or hereafter acquired by the Railroad Company, shall be, and shall be held by 290
> the Railroad Company as security for the payment of the bonds hereby secured, and the Railroad Company shall at any time, upon the written demand of the Trustee, assign such claims, or deliver the evidences thereof to the Trustee."

I think the Trustee was entitled to the benefit of this covenant as against the New York City Railway Company and that effect may be given thereto in this proceeding. On April 30, 1907, when the note was dated and on June 27, 1907, when it was authorized by the Board of Directors, 291
the New York City Railway Company was in control of the defendant by virtue of its lease from the Metropolitan Street Railway Company, the defendant was one of the "Controlled Companies" mentioned in the mortgage, the New York City Railway Company was bound by the covenants in the mortgage, and if, as a matter of law, the note in question represented a valid claim against the defendant and in favor of the New York City Railway Company, it was impressed with a trust for the benefit of the Trustee of the mortgage and was held subject thereto

292 until the Trustee made its demand. When the demand was made, the obligation on the part of the New York City Railway Company to "assign" the claim "or deliver the evidences thereof to the Trustee" arose and the claim has passed to the Receiver subject to that obligation.

The Trustee, however, while asserting this right against the claimant in the event that the claim should be held valid, joins the Receiver of the defendant in his assertion that the claim is not valid and that it should be disallowed and it remains to determine that question.

293 The claimant's *prima facie* case was made by simply producing and proving the note. The evidence for the defense consists of the mortgage and leases, of the relations and obligations of the parties as shown therein and of the facts shown with respect to the books of the defendant and other controlled and subsidiary companies, their supervision in one general department by the Auditor of the New York City Railway Company and the apparent management by that Company of all the controlled and subsidiary companies as part of one system.

294 While the case made is sufficient in the absence of any proof at all by the defense, it is nevertheless not necessary for the defense to prove affirmatively that there was no actual consideration or to prove affirmatively that any fact necessary to establish the claimant's case upon the merits did not exist, for the burden of proof on the whole case remains on the claimant and if, upon all of the evidence, the question whether a case has been proved remains in doubt, then the claim must be disallowed (*Bringman* v. *Von Glahn,* 71 App. Div., 537; *Lombard* v. *Byrne,* 194 Mass., 236, 238). The question then is whether enough has been shown by the defense to meet the pre-

sumption arising from the fact that the claim is 295
based on a promissory note and to require the claimant to offer proof of an actual consideration. The question of consideration is, of course, open between these parties (*Batterman* v. *Butcher,* 95 App. Div., 213).

Cowee v. *Cornell,* 75 N. Y., 91, involved a claim upon a promissory note against the estate of the maker and it was contended that the relation of the parties had been such as to rebut the presumption raised from the plaintiff's possession of the note. Upon the facts of the case the contention was not sustained, but the rule there laid 296
down with respect to the burden of proof in such cases is important. The Court, by Judge Hand, after stating the general rule that fraud will not be presumed, said at the bottom of page 99 and the top of page 100:

> "Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled." 297

In *Duncombe* v. *N. Y. & H. R. R. Co.,* 84 N. Y.,

298 190, the reason for the rule is stated by Judge Finch on page 198 as follows:

> "Nor is it at all questioned that, in such cases, the right of the beneficiary or those claiming through him to avoidance does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honestly, but is founded upon the known weakness of human nature, and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee, in his fiduciary character."

299

The question in the case at bar is what effect shall be given to the influence of the New York City Railway Company as owner of the majority of the stock of the defendant in view of the facts and circumstances under which the control was obtained and exercised. I have been referred to no case and have found no case directly in point, but the legal effect of the relationship is considered in cases brought by minority shareholders to question acts of the majority and in other cases where the parties did not deal on terms of equality, and the general rules laid down by the Courts

300 in those cases may be considered.

In *Meeker* v. *Winthrop Iron Co.*, 17 Fed. Rep., 48, the Court said:

> "The ownership of the majority of the capital stock of a corporation invests the holders thereof with many and valuable incidental rights. They may legally control the Company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty

of diligence and good faith. They cannot 301
lawfully manipulate the company's business in their own interests to the injury of other incorporators. Any contract made by them in behalf of their principal with themselves or with another for their personal gain would be voidable at the option of the company * * *. The law does not thus vest majority stockholders with any such dangerous power, invite such peculations, or open the door to such abuses. If a majority of stockholders can, in any event and under any circumstances, thus vote away the corporate property to their individual uses * * * they 302
could only do so on the clearest and most satisfactory evidence of good faith, and for an adequate consideration; and the burden of proof is upon the parties thus acting and claiming the enforcement of such a contract." See also *Rogers* v. *N. C. & St. L. Ry. Co.*, 91 Fed. Rep., 299.

In *Mumford* v. *Ecuador Development Co.*, 111 Fed. Rep., 639, Judge Coxe said:

"The rule deducible from all these cases is that although a majority may lawfully make a contract with the company such con- 303
tract will be scrutinized with much greater care than if made with a third party and unless it appears that it was made honestly and for an adequate consideration, a court of equity will interpose to prevent such contract from being used oppressively and in violation of the rights of the minority * * *. If then it shall appear, no matter what may be the machinery employed, that the majority have sold the corporate property to themselves for a wholly inadequate consideration a court of equity will grant relief to the minority who have thus been despoiled of their property. * * *"

304 In *Farmers' Loan & Trust Company* v. *N. Y. & N. R. Co.*, 150 N. Y., 410, the authorities are collected and considered and the Court by Judge Martin said, at the bottom of page 430 and top of page 431:

> "While the question in some of the cases cited arose between stockholders and the directors and officers of a company who as such held a position of trust as to the former, still, where, as in this case, a majority of the stock is owned by a corporation or a combination of individuals, and it assumes
305 the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders, and, therefore, under such circumstances, the rule stated in the *Sage* and other similar cases applies to majority stockholders who control the affairs of the company, as well as to its directors or officers."

306 In *Continental Insurance Co.* v. *N. Y. & H. R. R. Co.*, 187 N. Y., 225, the Court, by Chief Judge Cullen, said at page 238:

> "We concede to its fullest extent the rule which requires of the majority of the stockholders the utmost good faith in the control and management of the corporation, and in this respect the majority stand in much the same attitude towards the minority that directors stand towards all the stockholders. (2 Cook, Stock and Stockholders, sec. 662.)"

See also *Gamble* v. *Q. C. W. Co.*, 123 N. Y., 91;

Sage v. *Culver,* 147 N. Y., 241, 247; *Ten Eyck* v. *Whitbeck,* 156 N. Y., 341, 353; *Butler* v. *Prentiss,* 158 N. Y., 49, 60; *Dohany* v. *Lacy,* 168 N. Y., 213, 222; *Russell* v. *Fuel Gas Co.,* 184 Pa. St., 102, 108. 307

In *Richardson* v. *Green,* 133 U. S., 30, the Court, by Mr. Justice Lamar, said at page 43:

> "Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions not, perhaps, with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement." 308

It is undoubtedly true that a majority stockholder may contract with his corporation (*Central Trust Co.* v. *Bridges,* 57 Fed. Rep., 753) and it has been said that the law will not presume from that fact alone that he has abused his position, but, at the same time, the parties in such a case cannot be said to have dealt upon terms of equality and the Courts accordingly examine their transactions "with a large measure of watchful care" and scrutinize them "with much greater care than if made with a third party." The New York City Railway Company was in a position to have its claim put in the form of a promissory note and if the disclosure of the relationship shown by the defence is not sufficient to meet the *prima facie* case made by the note itself, what becomes of the rule which requires that when such a relationship 309

310 exists the adequacy and fairness of the consideration shall be examined with special care? I think the rule must be applied regardless of the form of the claim and that the *prima facie* case made by the claimant is met by the facts disclosed by the defence and that upon the record as it stands, the burden is upon the claimant to prove an actual, adequate and fair consideration.

It may be objected that if no presumption of unfairness is raised by the mere fact that the contract of a corporation is made with its majority stockholder (as is stated in certain *dicta*), the burden should not shift and that, in holding that
311 it does shift, such a presumption is really indulged, but these *dicta* must be read with the well settled doctrine which I have invoked and when read together, the apparent inconsistency disappears, and the law would seem to be that when a contract has been made between two parties, one of whom controlled the other, and the nature of his position as the stronger party was such that it was his duty in all respect to deal fairly by the other, that while the law will not presume that the relationship has been abused, it will nevertheless recognize the fact that the power to be unfair existed
312 and will for that reason examine the merits with special care before awarding judgment. The rule that in such cases the merits must be examined with special care is quite consistent with the rule that fraud will not be presumed, which rule is wholly responsible for the *dicta* to the effect that a majority stockholder will not be presumed to have abused his power and if there is any vitality whatever in the first proposition, that the fairness of a contract between parties who do not deal on terms of equality must be particularly enquired into, it is certainly sufficient to require the con-

trolling party who sues as payee on a note ob- 313
tained while he was in control, to prove an actual consideration. Moreover, it is to be noted that in suits brought by minority stockholders as complainants, the burden of proof on the whole case is on them and the mere fact that a contract was made with the majority stockholder would, of course, be insufficient evidence upon which to set it aside and *dicta* in those cases to the effect that a majority stockholder will not be presumed to have violated his duties to the minority are properly placed. In such a case, in accordance with an obviously sound policy of the law the Courts 314
decline to interfere with the situation. When, however, the majority stockholder is plaintiff, the burden of proof is on him and although, when he sues on a note, he is entitled to a presumption sufficient to make a *prima facie* case, the question whether the presumption (which he had power to create by giving himself the note) is met when the existence of the power is proved by the defense is a different one. In such a case, an equally sound principle should compel him to prove his case.

In the case at bar, however, the defense has proved more than the mere fact that the payee of 315
the note owned a majority of the defendant's stock. With that fact alone, it might be argued that for all that appeared the defendant might have been controlled by a board of directors, who acted quite independently in the conduct and management of its business, but the facts here disclosed compel the inference that the power of control vested in the New York City Railway Company was in fact exercised. When that Company obtained a majority of the defendant's stock in 1902, it obtained at the same time a majority

316 of the stock of certain other Street Railway Companies and control of still other such companies by actual lease, and all of the companies were operated together as one street railway system. The New York City Railway Company controlled the whole situation and the inference is irresistible that the Companies controlled by a majority stock ownership were as much managed and run by the head of the system as the Companies whose franchises and property were actually leased and if it can be said that there is any question of fact upon the record as to whether the New York City Railway Company, as owner of a majority of the de-
317 fendant's stock, did actually and actively assert and exercise its power to control, I find the fact to be that it did.

The defendant had been thus controlled and its road operated as one part of this large system for about five years when its directors authorized the issue of the note in question to be dated April 30, 1907, and payable to the corporation in whose power it was. This was done at a meeting held on June 27, 1907, and within three months thereafter, in September, 1907, the corporation in control admitted its insolvency and went into the
318 hands of Receivers. In February, 1908, the defendant did likewise and its property is in the hands of the Court in equity, held and managed by its Receiver as a trust fund for the benefit of creditors. In this proceeding, we are engaged in determining who are its creditors and are taking the proofs of all those who claim to be creditors, to the end that the assets may be distributed by the Equity Court among those only who are lawfully entitled thereto. The rules of law must be applied in determining claims that are in effect causes of action at law and a claim on a note is such a case.

The insolvency of the defendant is thus not relevant, but nevertheless the situation here presented is strong evidence in support of the proposition that as a matter of law the plaintiff in an action on a note must prove his case on the merits if the defendant proves that when the note was made and delivered he was controlled by the plaintiff and that his actions were dictated by the plaintiff. Full justice is done the controlling party if he is allowed judgment on all claims proved on the merits. If, by the exercise of his power to have a note issued to himself, he could bar an examination into the merits, or if a Receiver taking possession after the events in question must prove affirmatively that the claimant did not deal fairly while he had control, full justice might not be done to the other creditors. 319 320

I conclude that the *prima facie* case made by the claimant is met by the facts disclosed by the defense, not because fraud is presumed, but because it appears not only that the parties did not deal upon terms of equality, but that the acts of the defendant were really the acts of the New York City Railway Company and that the defendant had no real independence at all and because this control of the maker by the payee raises a question as to whether, as against the minority stockholders and creditors of the maker, who were entitled to absolute fair play, the consideration was in fact adequate and fair. It follows that the burden of proof which rests upon the claimant throughout the case has not been sustained and that the claim must be disallowed. 321

For the reasons above stated, I find and report the following as my formal

322 **Conclusions.**

I.

First.—That the New York City Railway Company was not entitled to interest on the promissory note in the sum of $6,491,967.44 made by the defendant to the Morton Trust Company, as Trustee of the "First Consolidated Mortgage" of the Third Avenue Railroad Company and now held by the Central Trust Company, as substituted Trustee under said Mortgage.

323 *Second.*—That the Receivers of the New York City Railway Company were not entitled to interest on said note.

Third.—That the amount charged and claimed for interest on said note by the New York City Railway Company and its Receivers in the claim on open account exceeds the balance claimed to be due on said account.

Fourth.—That the claim on open account should be disallowed.

324

II.

Fifth.—That the claimant made a *prima facie* case in his claim upon the promissory note by producing and proving the same.

Sixth.—That the *prima facie* case made by the claimant is met by the evidence introduced by the defense.

Seventh.—That the burden of proof remained upon the claimant throughout, and, upon the whole case as finally submitted, it has not been sustained.

Eighth. That the claim on promissory note should be disallowed. 325

III.

Ninth.—That by virtue of its lease from the Metropolitan Street Railway Company, the New York City Railway Company was bound by the covenants with respect to "Controlled Companies" made by the Third Avenue Railroad Company in its "First Consolidated Mortgage" to the Morton Trust Company, as Trustee.

326

Tenth.—That the Central Trust Company, as substituted Trustee under said Mortgage, is entitled to enforce said covenants against the New York City Railway Company with respect to transactions which occurred while said lease was in force.

Eleventh.—That if the conclusion that the claims herein should be disallowed is error and if said claims are valid as a matter of law they are claims against one of the "Controlled Companies" referred to in said Mortgage and as such are impressed with a trust in favor of the Central Trust Company as Trustee, and should be transferred to said Company by the claimant. 327

On April 28th, 1909, after the proofs in this proceeding had been closed and the claim submitted and after I had reached the conclusions above set forth, a motion was made before me by William J. Haley, administrator, a tort creditor herein, on behalf of himself and of any other creditors who might join with him, that the case be opened and that he be permitted to file objections and introduce evidence. The Barber Asphalt

328 Paving Company, the complainant, appeared and joined in said motion. I denied the motion and the moving parties thereupon applied for leave to have their appearances noted upon the record that they might be parties thereto and be heard upon any review of this report by the Court. No objection was made to this application and the same was granted.

I accordingly note the appearance of William J. Haley, administrator, by Mr. Selden Bacon, his attorney, and the appearance of the Barber Asphalt Paving Company, by Messrs. Kellogg &
329 Rose, its attorneys.

I submit herewith as a part of this report the original proof of claim, objections and papers relating thereto, the minutes of all testimony taken, being included within pages 1073 and 3380 of the record of proceedings before me, and copies of the "First Consolidated Mortgage" of the Third Avenue Railroad Company to the Morton Trust Company, as Trustee, dated May 15th, 1900, lease from the Third Avenue Railroad Company to the Metropolitan Street Railway Company, dated April 13th, 1900, and lease from the Metropolitan Street Railway Company to the Inter-
330 urban Street Railway Company, now New York City Railway Company, dated February 14th, 1902, it having been stipulated by the parties that said copies be received as exhibits of the defendant in lieu of the original instruments.

Dated, New York, May 1st, 1909.

Respectfully submitted,
EDWARDS H. CHILDS,
Special Master.

(Endorsed)—"Filed May 4, 1909."

The mortgage and leases referred to in the above report of the Special Master appear in the Exhibit Book.

UNITED STATES CIRCUIT COURT, 331

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendants. 332

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, No. 172.

PLEASE TAKE NOTICE that the annexed is a copy of exceptions of the above-named claimant to the 333
report of Honorable Edwards H. Childs, Special Master herein, this day duly filed herein in the

334 office of the Clerk of the United States Circuit Court for the Southern District of New York.

Dated May 27th, 1909.

DEXTER, OSBORN & FLEMING,
Solicitors for W. W. Ladd,
as Receiver of N. Y. City
Railway Company, Claimant,
71 Broadway,
Borough of Manhattan,
New York City.

To Messrs. Merrill & Rogers,
Solicitors for Receivers of Third Ave.
335 *R. R. Co. & 42nd St., &c., Railway Co.,*
128 Broadway,
New York.

Messrs. Bowers & Sands,
Solicitors for Central Trust Company,
31 Nassau Street,
New York.

[Endorsed]—Filed June 9, 1909.

336

UNITED STATES CIRCUIT COURT, 337

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendants. 338

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, No. 172.

The above-named claimant, William W. Ladd, as Receiver of the New York City Railway Company, 339 hereby excepts to the report of the Hon. Edwards H. Childs, the Special Master herein, made in the above entitled matter May 1st, 1909, and filed in the office of the Clerk of this Court on the 4th day of May, 1909, in the following particulars:

FIRST EXCEPTION.—The claimant excepts to the Special Master's conclusion of law (Conclusion I, Subd. 1st):

> "That the New York City Railway Company was not entitled to interest on the promissory note in the sum of $6,491,967.44 made

340 by the defendant to the Morton Trust Company, as Trustee of the 'First Consolidated Mortgage' of the Third Avenue Railroad Company and now held by the Central Trust Company, as substituted Trustee under said mortgage,''

that said conclusion is against law, because the said note was the property of the Third Avenue Railroad Company (Stenographer's Minutes, pp. 2780, 2783, 2785) and interest thereon was income of the said company to which the New York City Railway Company was entitled under the lease from the Third Avenue Railroad Company to Met-
341 ropolitan Street Railway Company.

Second Exception.—The claimant excepts to the conclusions of law (Conclusion 1, Subd. 2d):

''That the Receivers of the New York City Railway Company were not entitled to interest on said note,''

that said conclusion is against law, because said Receivers upon their appointment succeeded to the right of said New York City Railway Company, as set forth in the above First Exception, to such interest.

342 Third Exception.—The claimant excepts to the conclusion of law (Conclusion I, Subd. 4th):

''That the claim on open account should be disallowed,''

that said conclusion is against law, because the Special Master should have allowed said claim on open account.

Fourth Exception.—The claimant excepts to the conclusion of law (Conclusion II, Subd. sixth):

''That the *prima facie* case made by the claimant is met by the evidence introduced by the defense,''

that said conclusion is against law, because it is 343
contrary to the evidence.

Fifth Exception.—The claimant excepts to so much of the conclusion of law (Conclusion II, Subd. seventh) as finds that the claimant has not sustained the burden of proof upon the whole case as finally submitted, that such part of said conclusion is against law because it is contrary to the evidence.

Sixth Exception.—The claimant excepts to the conclusion of law (Conclusion II, Subd. eighth):

> "That the claim on promissory note should 344
> be disallowed,"

that said conclusion is against law because it is contrary to the evidence.

Seventh Exception.—The claimant excepts to so much of the conclusion of law (Conclusion III, Subd. eleventh) as finds that the claims herein if valid as a matter of law, are impressed with a trust in favor of the Central Trust Company as Trustee under said mortgage and should be transferred to said company by the claimant; that said conclusion is against law because the said claims arise out of operating expenses and the said mort- 345
gage does not prevent the New York City Railway Company or its Receivers from enforcing said claims free from any trust or claim of said Central Trust Company.

Dated, New York, May 25th, 1909.

DEXTER. OSBORN & FLEMING,
Solicitors for Wm. W. Ladd as Receiver for the New York City Railway Company,
71 Broadway,
Borough of Manhattan,
New York City.

(Endorsed)—Filed May 27, 1909.

346 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
347 *Defendants.*

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, No. 172.

Claimant's Notice of Hearing.

348 SIRS:

PLEASE TAKE NOTICE that the exceptions of the above named complainant to the report of Hon. Edwards H. Childs, the Special Master herein, will be brought on for hearing before Hon. E. Henry Lacombe, Circuit Court Judge, in Room 124 of the Federal Court House Building on the 3rd day

of June, 1909, at 10:30 in the forenoon, or as soon 349
thereafter as counsel can be heard.

Dated, New York, May 29th, 1909.

DEXTER, OSBORN & FLEMING,
Solicitors for Claimant,
Office and Post-Office Address:
71 Broadway,
Borough of Manhattan,
City of New York.

To

MESSRS. MERRILL & ROGERS,
Solicitors for Receivers of Third Ave.
R. R. Co. & 42nd St. Ry. Co., 350
128 Broadway, New York.

MESSRS. BOWERS & SANDS,
Solicitors for Central Trust Co.,
31 Nassau Street, New York.

(Endorsed)—Filed June 9, 1909.

351

352 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY.

353

CLAIM OF WM. W. LADD, RECEIVER OF NEW YORK CITY RAILWAY COMPANY.

LACOMBE, *C. J.*:

It is quite important that there should be an early final determination of the questions arising upon these exceptions, especially because similar questions are presented in the cases affecting the other "controlled companies," and it is expected that the receiverships of the various units comprised in the Third Avenue system can soon be terminated if all legal complications are
354 disposed of. Therefore, it seems wiser not to undertake the preparation of an extended opinion, but to indicate briefly the conclusions of this Court. The first seven conclusions of the special master as to "open account" and the "promissory note for $893,433.30" are concurred in for the reasons given in his report. The exceptions to the eleventh conclusion, that the claim on the said note is impressed with a trust in favor of the mortgage trustee, are sustained for these reasons: 1. Construing the instrument as a whole I am not satisfied that it was the intent of the par-

ties that obligations incurred to the Railway Company (or to its assignees or sub-lessee) for current operating debt incurred in the ordinary course of business should be held for or assigned to the trustee under the provisions of the clause relied upon on page 43 of the printed copy of the mortgage. 2. No written demand was made by the trustee until after the property passed out of the control of the sub-lessee into that of the receivers. In view of the conclusion reached as to the eleventh conclusion, it is not necessary now to discuss the ninth or tenth conclusions. In order, however, to facilitate the presentation of the whole case on appeal the exceptions to those conclusions are overruled. As to the eighth conclusion, the exception is overruled, but the order confirming the report should contain a clause allowing claimant to prove so much of the claim represented by this promissory note as includes "current operating debt incurred in the ordinary course of business."

355

356

(Endorsed) Filed June 9th, 1909.

357

358 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
359 *Defendants.*

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, No. 172.

Now on this 15th day of June, 1909, this cause
360 came on for a final hearing on the report of Edwards H. Childs, Special Master, said report being dated May 1, 1909, and filed on May 4, 1909, the exceptions thereto filed on May 7, 1909, by the claimant, William W. Ladd as receiver of the New York City Railway Company, and the evidence and proofs in the case.

Whereupon on reading and filing the said exceptions, together with proof of due service of the notice of hearing thereon on Messrs. Merrill & Rogers, Solicitors for the receiver of the defendant company and the receiver of the Third Ave-

nue Railroad Company, on Messrs. Bowers & 361
Sands, Solicitors for the Central Trust Company, on Selden Bacon, Esq., Solicitor for William J. Haley, Esq., Administrator, and on Messrs. Kellogg & Rose, Solicitors for the Barber Asphalt Paving Company; and it further appearing that notice of said hearing had been duly given to the solicitors of the Pennsylvania Steel Company, the Degnon Contracting Company, the Metropolitan Street Railway Company, the New York City Railway Company, the Guaranty Trust Company, the Morton Trust Company, John D. Crimmins and others as a Committee of Contract Creditors, 362
John I. Waterbury, Esq., and others, as a Committee of Stockholders of the Metropolitan Street Railway Company and Charles Benner and others as a Committee on Tort Creditors; and after hearing Matthew C. Fleming, Esq., of counsel for the receiver of the New York City Railway Company, J. Parker Kirlin, Esq., of counsel for the Metropolitan Street Railway Company, and Benjamin S. Catchings, Esq., of counsel for Charles Benner, Esq., on behalf of said claimant, and Arthur H. Holbrook, Esq., and George W. Davison, Esq., in opposition thereto, and the Court being fully advised in the premises; it is 363

Ordered, Adjudged and Decreed that the claimant's exceptions numbered First to Sixth, inclusive, be and the same hereby are overruled, that the Special Master's conclusions numbered First to Tenth, inclusive, be and the same hereby are confirmed, and that the claimant's exception numbered Seventh, which excepts to the Special Master's conclusion numbered Eleventh, be and the same hereby is sustained; and it is further

Ordered, Adjudged and Decreed that this cause be remanded to the Special Master for a re-hearing, and that on said re-hearing the claimant be

364 allowed to prove so much of the claim represented by the promissory note for eight hundred ninety-three thousand four hundred thirty-three and 30/100 dollars ($893,433.30) as includes "current operating debt incurred in the ordinary course of business."

E. HENRY LACOMBE,
U. S. C. J.

Endorsed:—"Filed June 15th, 1909."

UNITED STATES CIRCUIT COURT,

365 SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY, *Complainant,* *vs.* THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILROAD COMPANY, *Defendant.*	In Equity.
IN THE MATTER *of* The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company.	No. 172.

366

New York, October 13, 1909.

Adjourned by consent to Friday, October 22, 1909, at 11 o'clock A. M.

New York, October 22, 1909. 367

Met pursuant to adjournment.

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, Receiver of the New York City Railway Company. (GEORGE N. WHITTLESEY, of Counsel.)

BOWERS & SANDS, Solicitors for the Central Trust Company. (GEORGE W. DAVISON, of Counsel.)

MERRILL & ROGERS, Solicitors for F. W. Whitridge, Receiver of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company. (CHARLES H. MAPLEDORAM, of Counsel.) 368

EVARTS, CHOATE & SHERMAN, Solicitors for F. W. Whitridge, Receiver of the Third Avenue Railroad Company. (HERBERT J. BICKFORD, of Counsel.)

Adjourned by consent to Thursday, October 28, 1909, at 11 o'clock A. M.

369

370 New York, October 28, 1909.

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, Receiver of the New York City Railway Company. (GEORGE N. WHITTLESEY, of Counsel.)

MERRILL & ROGERS, Solicitors for F. W. Whitridge, Receiver of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company. (ALFRED H. HOLBROOK, of Counsel.)

371 EVARTS, CHOATE & SHERMAN, Solicitors for F. W. Whitridge, Receiver of the Third Avenue Railroad Company. (HERBERT J. BICKFORD, of Counsel.)

The Master: I call Mr. Whittlesey's attention to the fact that under the order remanding the case for re-hearing the claimant may prove so much of the claim represented by the promissory note for $893,433.30 as includes current operating debt incurred in the ordinary course of business. This branch of the original claim was based upon a promissory note in that sum only, and the only
372 evidence before the Master is the fact that at a meeting of the Board of Directors of The Forty-second Company, held on June 27, 1907, a general balance sheet under date of April 30, 1907, was presented, upon which there appeared the statement under the heading "Operating Liabilities" that there was due to the New York City Railway Company the said sum of $893,433.30; that at that meeting a resolution was passed authorizing the proper officers of the company to execute, issue and deliver demand notes to cover the operating indebtedness of the Company as shown in the bal-

ance sheet, and that the note in question was issued pursuant to that resolution. It does not appear how the amount became due, whether upon open account or otherwise, or when the items accrued, and all that appears is that the total sum was set forth among the operating liabilities as due to the New York City Railway Company. I am informed that this amount is the balance shown on the books of the Forty-second Street Company, or the New York City Railway Company as due to the New York City Railway Company on an open account extending over a long period, and I would like to know whether that is the fact and whether you are prepared to make any admission upon the record in respect to the subject. 373 374

Mr. Whittlesey: It is the fact that the amount for which the note referred to by the Master was given was a balance of an account on the New York City ledger, known as The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company account, which was an operating account, and which runs back for a period of years. The same account, of course, with the debits and credits reversed appears on the books of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company in its account with the New York City Railway Company. 375

The Master: For how long a period?

Mr. Whittlesey: Under the terms of the Third Avenue Railroad Company's lease to the Metropolitan Street Railway Company of 1900, the accounts of the controlled companies were separately kept, because under the terms of the lease any rental to be paid on the Third Avenue lien was to be measured by net earnings for a period of the first four years, down to April 13, 1904. There

376 was at that time a balance on operating account against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, and as I understand it so much of the account as ran from the date of the lease to the New York City Railway Company in 1902 down to April 13, 1904, was on or about the latter date transferred to the New York City ledger in the account to which I have just referred, and that account was then continuously carried as an operating account down to the 30th of April, 1907, as of which date a balance was struck, which balance was in favor of the New York City Railway Company to the
377 amount of $893,433.30, for which the note of that date was given in liquidation of that balance. In view of the decision of the Circuit Court which permits us to prove only so much of the claim represented by that note as it was current operating expense incurred in the ordinary course of business, it would be necessary or proper for us to submit a transcript of the open account to which I have referred. That will show on its face the items claimed as items of operating account, and we can proceed with the proof with that transcript of account as a basis.

378 The Master: I shall be glad to have a complete transcript of that open account which was closed by the issuing of this note, showing all of the items charged against the Forty-second Street Company and all credits received, and showing also the dates when the items were charged, and the dates when credits, if any, were made. Have you made any preparation to prove such items as constitute operating expenses incurred in the ordinary course of business?

Mr. Whittlesey: I am not prepared to do that to-day. I am preparing to do so, and I would ask

for an adjournment of one week, at which time I will be prepared to proceed with the proof. 379

The Master: At which time you will file the transcript, is that so?

Mr. Whittlesey: I think I can undoubtedly do so.

The Master: I want to remind you of the great importance of proceeding as rapidly as possible, and trust that you will consider just what items upon that account properly come within the terms of the order of the Circuit Court, and be prepared to prove the same, or determine whether or not you can prove the same, to the end that this proceeding may be closed as soon as possible. 380

Adjourned by consent to Thursday, November 4, 1909, at 11 o'clock A. M.

381

382 New York, November 4, 1909.

Met pursuant to adjournment.

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, Receiver of the New York City Railway Company. (GEORGE N. WHITTLESEY, of Counsel.)

BOWERS & SANDS, Solicitors for the Central Trust Company. (MIDDLETON S. BORLAND, of Counsel.)

383 MERRILL & ROGERS, Solicitors for F. W. Whitridge, Receiver of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company. (ALFRED H. HOLBROOK, of Counsel.)

EVARTS, CHOATE & SHERMAN, Solicitors for F. W. Whitridge, Receiver of the Third Avenue Railroad Company. (HERBERT J. BICKFORD, of Counsel.)

GEORGE I. HUNT, called as a witness for the claimant, being duly sworn, testifies as follows:

384 *Direct-examination by Mr. Whittlesey:*

Q. Mr. Hunt, are you the auditor for William W. Ladd, as Receiver of the New York City Railway Company? A. I am, sir.

Q. How long have you been such auditor? A. Since October 13, 1908.

Q. Are you familiar with the claim of the Receiver of the New York City Railway Company on trial here? A. Yes, sir.

Q. You have seen the note for $893,433.33, dated April 30, 1907, which is one of the elements of that claim here? A. I have.

Q. That note was given for an alleged balance 385
of account in favor of the New York City Railway Company and against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. It was.

Q. Do you know on what books the account which was balanced as of April 30, 1907, to liquidate which balance that note was given, do you know in what books that account is to be found? A. I do.

Q. Have you examined that account? A. I have examined that account, yes, sir.

The Master: Is there any question about 386
that?

Mr. Bickford: I do not know that there is. Can I ask one question?

The Master: Certainly, go ahead.

By Mr. Bickford:

Q. You did not keep those books yourself? A. No, sir.

Q. Did you have anything to do with that transaction of the balancing of the books and the giving of the note? A. I did not.

Q. Your testimony is based entirely on having 387
examined the books, having examined the note, and having found the note is for the apparent amount of the balance? A. As per the books; yes, sir.

By Mr. Whittlesey:

Q. Will you state in what ledgers you found that account? A. It is made up of two ledgers of the Third Avenue system, two ledgers of the Metropolitan, and three ledgers of the New York City Railway Company.

38 Q. I will ask you more definitely to name the ledgers in which you found that account? A. Ledger No. 1, Metropolitan Street Railway Company, Lessor, Third Avenue Railroad Company. Ledger, Construction, Metropolitan Street Railway Company, Interurban Account. Ledger A-2, Metropolitan Street Railway Company. General Ledger No. 1, Third Avenue Railroad Company. General Ledger No. 1, Interurban Street Railway Company, Lessee. General Ledger No. 2, Interurban Street Railway Company. General Ledger No. 3, New York City Railway Company, Lessee Metropolitan Street Railway System.

389 Q. How many books in all? A. Seven books in all.

Q. The last book which you have mentioned is the book in which the balance of $893,433.33 appears, is it not? A. That is the book; yes, sir.

Q. Mr. Hunt, have you at my request made a transcript of this entire account appearing in these seven books which you have mentioned? A. I have, sir.

Q. Have you compared that transcript with the original? A. It has been compared.

Q. Is it a correct transcript? A. Well, yes, it

390 is a correct transcript.

Q. It is an exact reproduction of the entries in this account in the ledgers that you have mentioned? A. Precisely.

Q. And all of them? A. All of them.

Q. Giving the dates, the description, the folio or other marks contained in the general ledgers, and the amounts in the form in which they are contained in those ledgers? A. Exactly.

Mr. Whittlesey: I can have each of these ledgers marked for identification, but I would like to have the stipulation that this transcript

may be marked for identification, with the same force and effect as if the original ledgers had been themselves marked for identification, subject to correction from the original ledgers, if any error is found, for the convenience of all parties. I have a copy which Mr. Bickford may have. 391

Mr. Bickford: I have no objection to the transcripts being used, with the same force and effect as the books themselves.

Mr. Holbrook: Neither have I.

Q. Mr. Hunt, I show you a transcript appearing in seven small typewritten volumes, and ask you if this is the transcript to which you have testified (handing transcripts to witness)? A. They are, sir; those are the transcripts I have testified to. 392

Q. And those are the transcripts of the accounts in the seven ledgers which you have mentioned? A. Yes, sir.

Q. On the cover of each of these transcripts is the endorsement stating what the ledger is from which the account was taken? A. Yes, sir.

Mr. Whittlesey: I ask that these seven transcripts be marked for identification.

The transcript marked Ledger No. 1, Metropolitan Street Railway Company, Lessor, Third Avenue Railroad Company, is marked Claimant's Ex. D, Nov. 4, 1909. 393

The transcript marked Ledger, Construction, Metropolitan Street Railway Company, Interurban Account, is marked Claimant's Ex. E, Nov. 4, 1909.

The transcript marked Ledger A-2, Metropolitan Street Railway Company, is marked Claimant's Ex. F, Nov. 4, 1909.

The transcript marked General Ledger No.

394 1, Third Avenue Railroad Company, is marked Claimant's Ex. G, Nov. 4, 1909.

The transcript marked General Ledger No. 1, Interurban Street Railway Company, Lessee, is marked Claimant's Ex. H, Nov. 4, 1909.

The transcript marked General Ledger No. 2, Interurban Street Railway Company, is marked Claimant's Ex. I, Nov. 4, 1909.

The transcript marked General Ledger No. 3, New York City Railway Company, Lessee Metropolitan Street Railway System, is marked Claimant's Ex. J, Nov. 4, 1909.

395 Mr. Whittlesey: That is all just now, Mr. Hunt.

HENRY W. BROWN, called as a witness for the claimant, being duly sworn, testifies as follows:

Direct-examination by Mr. Whittlesey:

Q. Mr. Brown, you have been examined as a witness in this claim before, have you not? A. I believe not; I have no recollection of it.

Q. Mr. Brown, are you the auditor to the Re-
396 ceivers of the Metropolitan Street Railway Company? A. I am.

Q. And were you also auditor to Joline and Robinson as Receivers of the New York City Railway Company? A. I was.

Q. From September 24, 1907, to July 31, 1908? A. I was.

Q. What previous connection had you had with the street railway system of the City of New York? A. I had been in charge of the accounting department from July 1, 1904, to September 24, 1907, with various titles at different times.

Q. The books of the New York City Railway Company from July 1, 1904, were kept under your supervision? A. They were.

Q. Were the books of which a transcript has been marked for identification at this hearing, so far as they contain entries or relate to a period from July 1, 1904, on, among the books kept under your supervision? A. They were. 397

Q. What experience had you had in accounting or as a bookkeeper prior to July 1, 1904?

Mr. Bickford: We will admit that Mr. Brown is an expert bookkeeper.

Mr. Whittlesey: It is admitted that Mr. Brown is an expert bookkeeper. It is also admitted that he is an accountant familiar with railway and street railway accounting. 398

Mr. Bickford: I do not know about railways.

Q. Are you familiar with accounting methods which are in use among railways generally, including steam railways throughout the country? A. I am intimately familiar with the methods that were used up to 1900, and am generally familiar with the accounting methods since then. There have been some changes in the accounting methods prescribed by the Interstate Commerce Commission, and in view of my not being connected with steam railroads, I have not made a study of it; but while I have not made a detailed study, I am familiar with them generally. 399

Q. You had had practical experience in accounting in connection with steam railroads prior to 1900, had you? A. Prior to 1900 I worked in every department of steam railroad accounting offices.

Mr. Whittlesey: If the Master please, I will now go into one or two of the items constituting the balance for which the note in suit is given.

400 Mr. Bickford: I suggest you have not laid a foundation for that, if you are going to base them on the accounts.

Q. Mr. Brown, I show you a transcript of page 119 of General Ledger No. 3, New York City Railway Company, Lessee Metropolitan Street Railway system, an account entitled "Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company," which has been marked for identification Claimant's Exhibit J, under date of April 30, 1907, the entry being a charge and reading "To miscellaneous interest, Voucher No. 933,
401 page 52, $21,260.18," and will ask you if that was one of the items of charge against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company which entered into the account which was balanced as of April 30, 1907, and for which the note was given which is in suit here (handing exhibit to witness)?

Mr. Bickford: The transcript is substituted merely as a matter of convenience, and all objections which would be open to the book itself are open to the transcript.

402 A. It is.

By Mr. Bickford:

Q. Mr. Brown, you did not make that entry yourself? A. It was made under my direction.

By Mr. Whittlesey:

Q. Mr. Brown, upon what sum was this amount of interest charged, if you know? A. It was charged on the amount shown as due the New York City Railway Company March 31, 1907, for $914,141.09; the amount due the Metropolitan

Street Railway Company on the same date, 403
$41,401.67; the amount due the Third Avenue Railroad Company on the same date, $16,804.49, these three items being open accounts between the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company and the companies mentioned; on notes due the Third Avenue Railroad Company, aggregating $6,072,369.62; note due the Metropolitan Street Railway Company of $5,075.46; making a total of $7,049,792.33.

From this deduct the interest on the floating debt which was included in the above open account, aggregating $939,622.67; making a net figure of 404
$6,110,169.66, which at four per cent. interest made $20,367.23.

Then in addition to this there was a five per cent. note of the Third Avenue Railroad Company, or notes—I think there were more than one—aggregating $214,309.42; which interest at five per cent. was $892.95, making a total of $21,260.18.

By Mr. Bickford:

Q. Was that interest for one month? A. That was interest for one month, yes.

By Mr. Whittlesey: 405

Q. Mr. Brown, do you know what the total amount of interest charged against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company in this account, of which a transcript has been marked for identification, and which account resulted in a balance for which the note of $893,433.33 was given; do you know how much the total amount of interest so charged was? A. I do not. That is something that would have to be worked out. I have never prepared such a statement; it can be prepared.

406 Q. Mr. Brown, what was the nature of the account on which there was a balance due the New York City Railway Company upon which interest was computed, and which was one of the elements which entered into this charge of miscellaneous interest of $21,260.18?

Mr. Bickford: I object to that. It assumes this was due to the New York City Railway Company.

The Master: That it appears to be charged against.

Mr. Bickford: Let him ask what was the
407 nature of this account, Exhibit J for Identification.

Mr. Whittlesey: I am not asking for the nature of this whole account. This interest was computed on a total made up of separate elements, one of which purported to be due from the defendant to the New York City Railway Company on open account.

The Master: Ask him what it was.

Q. What was that open account, Mr. Brown? A. The New York City Railway Company charged the Forty-second Street, Manhattanville and St.
408 Nicholas Avenue Railroad Company with power, rent of cars, the cash fares collected on the Boulevard cars south of 45th Street, rent of tracks, labor and material furnished that company, and any payments the New York City Railway Company may have made for account of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, and credited the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company with any labor or material that the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad

Company may have furnished to the New York City Railway Company and credited with the cash paid by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company to the New York City Railway Company. I think that covers it substantially, covers the nature of it. 409

By Mr. Bickford:

Q. Was that a separate account from the account, a transcript of which has been marked for identification? (No answer.)

By Mr. Whittlesey:

410

Q. That is the account, is it not? A. That is the account.

Mr. Bickford: That is what I wanted to bring out.

Q. That is, this account which has been marked for identification, is the account which the New York City Railway Company charged the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company for such items as you have mentioned; is that so? A. That is correct.

Q. It also includes charges for rent and equipment, does it not? A. It does. 411

Q. Does it mention pay roll? A. I said labor and material.

Mr. Whittlesey: I think that is all for the present, Mr. Brown.

The Master: Any cross-examination?

Mr. Bickford: Yes.

Cross-examination by Mr. Bickford:

Q. Mr. Brown, when was the New York City Railway Company organized, about? A. Well, the

412 Interurban Street Railway Company was organized either the latter part of 1901 or early in 1902, I think the latter part of 1901.

Q. When did it take over the operation of the Metropolitan system? A. As of April 1, 1902; the lease was dated February 14, 1902, and it provided to take effect April 1, 1902.

Q. When it took over the operation of the Metropolitan system, it opened a set of books, did it not? A. It did.

Q. And the Ledger No. 1 of the Interurban Company, which has been referred to here, is the first of the ledgers then opened? A. I would have to
413 refer to the ledgers to see, because there is a little confusion as to the numbers of ledgers in the early part of the existence of the New York City Railway Company and the Interurban Street Railway Company, and I am not sure whether that was the first ledger or not, or whether it was the second one.

Q. It is your impression that that is the fact? A. Well, the proposition was this: There were two ledgers run concurrently at that time, one which was supposed to include only the operations of the New York City Railway Company, not in-
414 cluding the leased property, and the other ledger was to include the leased property, with the exception of the Third Avenue Railroad Company's property; there was a separate ledger kept of that. So that as a matter of fact there were three ledgers run concurrently. Later the ledger containing the accounts of the New York City Railway Company property, which was really its Mount Vernon Division, was merged into what was known as the lessee ledger of the Metropolitan Street Road, and just how the numbers ran I do not remember at this time; I would have to refer to the ledgers themselves.

Q. In which of these ledgers was the account with the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company kept? 415

Mr. Whittlesey: He testified this account was kept in the seven that have been marked for identification.

A. There were accounts with the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company. According to my recollection it started off with what was known as the Third Avenue ledger.

Q. The Third Avenue ledger was a ledger which was kept by you in the office of the Interurban Street Railway Company? A. That was a conglomerated ledger which ran concurrently, and the operations after April 1, 1902, represented in that ledger, are the operations of the New York City Railway Company as sub-lessee of the Third Avenue Railroad Company's property. 416

Q. Was the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company account kept in the Third Avenue ledger or in the ledger of the City Railway Company lessee? A. It was kept in both. Now, whether it was kept concurrently in both I do not remember. Of course the same items did not appear in both ledgers, if the ledgers were kept concurrently; it would only appear once. Whether the items appeared in the Metropolitan ledger or the Third Avenue ledger, I am not certain. 417

Q. All three of these ledgers were kept by you in the office of the New York City Railway Company? A. That is correct; they were all New York City Railway Company ledgers, as a matter of fact, even though their titles do not designate them.

418 Q. Can you tell me which ledger this is a transcript of which has been put in evidence, whether the New York City Railway Company lessee ledger or the Third Avenue ledger? A. If it is a full account; it would be a transcript from the accounts of all of them, so far as they related to the operating accounts.

Q. But you have not compared this, so you do not know as matter of fact whether it is a transcript of all? A. Well, no, I have not personally compared it. As I stated before, I assume this was a correct transcript of the accounts that on April 30th showed a balance equal to the amount
419 of the note.

Q. And that would necessarily involve the taking in of the entries from the New York City Railway Company ledger and the Third Avenue ledger? A. That is correct.

Q. And the Metropolitan. There was still another ledger of the Metropolitan? A. There are no transcripts here, I believe, of the Metropolitan Street Railway ledger itself, of the Metropolitan Street Railway Company lessor ledger.

By Mr. Whittlesey:

420 Q. Lessor of the Third Avenue? A. That is the ledger to which I have been referring. These titles are very confusing.

By Mr. Bickford:

Q. Then the Metropolitan lessee ledger and the Third Avenue ledger, to which you have referred, are the same? A. Well, now, those titles I cannot say; I would have to look at the books to see, or the transcripts, because I confess I cannot keep them in my mind.

Q. At the same time were you keeping a ledger

of the Forty-second Streeet, Manhattanville and St. Nicholas Avenue Railroad Company? A. There was a ledger of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company kept under my direction. 421

Q. And that was the ledger which has been produced and marked Claimant's Exhibit A? A. It is something I cannot testify to, as I was not present at the hearing.

Mr. Bickford: Mr. Whittlesey can perhaps say whether that is the fact.

Mr. Whittlesey: The ledger, which is Claimant's Exhibit A, is General Ledger No. 2 of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company—certain pages of it. 422

Q. That ledger was kept under your supervision, as you have testified? A. Whether it was General Ledger No. 2 that was in use from July 1, 1904, or subsequent to July 1, 1904, I do not remember.

By the Master:

Q. Was there any ledger of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company kept under your supervision at that time? A. Yes, subsequent to July 1, 1904. 423

By Mr. Bickford:

Q. Was there any subsequent to April 1, 1902, and prior to April, 1904? A. I had nothing to do with the accounts of any of the companies prior to July 1, 1904.

By the Master:

Q. What the condition was prior to that time,

424 as to who controlled or kept the book, you do not personally know; you do not mean to say they were or were not kept by your predecessor? A. I know who my predecessor was, but I do not know anything about the books, directly, prior to July 1, 1904.

By Mr. Bickford:

Q. The Interurban Street Railway and the New York City Railway Company are one and the same company, are they not? A. They are; the name was changed.

425 Q. Can you state what the terms of the notes upon which the item of interest, to which you have testified, was computed, were as to the payment of interest? A. Why, I would have to testify from recollection about that. My recollection is that the five per cent. note stated interest at the rate of five per cent., and the four per cent. notes, that is, the notes four per cent. interest was charged on, did not state the rate of interest.

Q. Did either of those notes define the dates when the interest was payable? A. They did not; that is my recollection of it, that they did not.

426 Q. But it was your practice to charge interest monthly upon those notes? A. That is correct, yes, sir.

Q. There was nothing on the face of these notes authorizing monthly charges, was there? A. No, sir; to the best of my recollection there was not.

Q. Who gave directions as to the items which should be charged to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company in this account, a transcript of which has been marked for identification? A. That is rather a difficult question to answer as to who specifically gave directions to do this. It was

based upon a theory that was accepted as being correct, and a theory that I found when I went in there, and it was followed out; as to who gave the original instructions that the accounts were to be kept, that the various items were to be paid by the different companies, that is, either the New York City Railway Company or the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, why, I cannot state. 427

Q. You say that they were distributed on some theory. What do you mean by that? A. I mean that the Forty-second Street, Manhattanville & St. Nicholas Avenue Railroad Company was charged by the New York City Railway Company for all the labor performed on its specific tracks for equipment, equipment used to produce its revenue, and for material that the New York City Railway Company furnished for the same purpose and credited the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company with any items for labor and material that they may have furnished or performed on the property operated by the New York City Railway Company. 428

By the Master:

Q. But was the amount that was to be credited to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company and also the amount that was to be charged the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company determined by the New York City Railway Company; was it their business? A. In my opinion, no. 429

By Mr. Bickford:

Q. Take, for instance, the supplies that were furnished by the New York City Railway Com-

430 pany to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, and materials. Who fixed the amount of the charge, the price to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. The price was fixed by the cost of the material to the New York City Railway Company, the cash cost.

Q. Those supplies were often taken out of the storehouse of the New York City Railway Company? A. That is correct.

Q. And did you have any method whereby you could ascertain the exact cost of the particular
431 bolts or the particular rails which were taken and put on the Forty-second Street property? A. On all the small stuff, such as bolts and the smaller parts, the material was kept in stock separated according to price, and the material itself was priced on the shelves, and when the material was issued, when a requisition would come in from the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company for material, the storekeeper when issuing the material from stock and taking it from the shelf would note the cost and the price. On the question of rails and
432 heavy material, it was in some instances charged at an average price; they would take the total amount of rails received at various prices and get an average price and charge it at such average price; when it could be ascertained, it was charged at the actual cost.

By the Master:

Q. When it was charged on the books of the New York City Railway Company, a corresponding charge would be charged on the books of the Forty-second Street, Manhattanville and St. Nicholas

Avenue Railroad Company showing its indebted- 433
ness? A. That is correct.

Mr. Bickford: That has not been proved.

Q. Now, Mr. Brown, who put the prices on the shelves? A. The general storekeeper.

Q. Of the New York City Railway Company? A. Of the New York City Railway Company.

Q. And under that system it would happen that there might be several shelves of the same material, each bearing a different price; that is, if you purchased the same materials at different times and had to pay a different price, you would 434
put those on a separate shelf? A. We would separate them; they might not be on a separate shelf, but they would be separated as to the price.

Q. So that there would be different prices in your storeroom upon articles of precisely similar goods? A. That is true; substantially a small variation in the price.

Q. Who would determine from which shelf the supplies for the Forty-second Street Company would be taken? A. That of course I could not state any more than I know the theory that they worked on was to issue the oldest material first.

Q. And that might be the highest price? A. It 435
might possibly, yes.

Q. And you charged on the books of the New York City Railway Company against the Forty-second Street Company the materials at the price at which it was issued from the storekeeper's department? A. That is correct; yes, sir.

Q. Those prices when the materials were issued might be very different from the market price on the day it issued? A. That is correct, yes, a little higher or lower.

Q. Were there any items charged against the

436 Forty-second Street Company in this account which had to be allocated according to some car mileage or other basis? A. Yes, sir.

Q. Who fixed that basis of allocation? A. Originally I cannot state; the practice was followed after I took charge of the accounts that had been followed previously.

Q. That was done in the office of the New York City Railway Company? A. That was done in the office of the New York City Railway Company; yes, sir.

Q. Will you state some of the items which were distributed in that way? A. Well, one particular
437 item that I can think of—of course I cannot think of all of them—one particular item, to illustrate, the cost of printing transfers. The transfers are used by each of the different companies and interchanged, and the cost of printing them was charged to the various companies on a car mileage basis, and in the same way the return of the advertising on the backs of the transfers was credited to the different companies on the same basis.

Q. Some of the lines would use a greater number of transfers for car mileage than others? A. That is true; that is one of those things that it is very
438 difficult to say, probably, that some one could raise an objection to; as a general condition, all companies received the benefit charged on a car mileage basis.

Q. How about charges for overhead expenses, salaries of officers, and your accounting department? A. That is something I cannot testify to without looking it up, because the matter now is so old to me, and I have been in so many different things, that I would have to go through the records to get it clear in my mind. It is something as to which if you wish me to testify you will have to give me time to prepare.

Q. You do know that those overhead charges 439
were apportioned upon some basis or other? A. There were certain of the overhead charges that were apportioned on a car mileage basis; but as to who the individuals were, or the nature of all the items, I cannot state that.

Q. What I am getting at more particularly is the basis, that is, it was a car mileage basis? A. It was a car mileage basis.

Q. And did that include the expenses of the legal department or were those apportioned upon some other basis? A. My recollection is that it did include the expenses of the legal department.

Q. You know, do you not, that as a matter of 440
fact, the accidents and the labor of the legal department in connection with accident claims is much greater in connection with some lines in the system than with others? A. That is true, yes.

Q. So that a car mileage basis might not be a correct basis or an actually equitable basis from which to make such distribution? A. That is entirely a matter of opinion.

Q. This basis, whatever it was, for the allocation of the charges which were not definite and fixed as accruing upon or in connection with the operation of the Forty-second Street Company, 441
were all determined by the New York City Railway Company or some of its officers? A. They were all what?

Q. They were all determined by the New York City Railway Company? A. That is a matter in my mind there is a question about. My own opinion is that both companies had something to say about the method to be used.

Q. What officer of the Forty-second Street, Manhattan and St. Nicholas Avenue Railroad Company was ever consulted in making an allocation

442 of charges against that company? A. Well, the question of the direct charges, they had the signatures of the employees of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Q. Well, what employees? A. The employees that received the material, or the employees that supervised their work.

Q. That is, employees whose duties were performed on that line? A. That is correct.

By the Master:

443 Q. You mean receipts for specific material? A. Yes.

Q. By the workmen? A. Yes, that is true.

By Mr. Bickford:

Q. That refers to direct charges? A. Yes, sir.

Q. I referred to the charges which required some allocation? A. Well, so far as that is concerned, who formulated the theory of the car mileage basis for general charges I cannot state. It was formulated prior to my connection; and after a theory and plan is laid down, it does not seem
444 to me it will be necessary to consult with anybody if you have a fixed rule.

By the Master:

Q. You followed orders? A. I followed out the plans I found.

Q. Was it not part of your duty to devise a plan, or was it simply your duty to carry out a plan devised by superior authority? A. It was my duty to carry out the plans that I thought were right. If I did not think they were right, it is my duty to question them.

By Mr. Bickford: 445

Q. To adopt some different basis? A. That was correct, yes.

By the Master:

Q. And you assumed some responsibility for this plan when you continued to operate under it? A. Yes.

By Mr. Bickford:

Q. In making up your charges, we will say for overhead charges, as an example, you had certain 446
items which you considered should be allocated to the different branches of the system, and either you or some one under your direction made that allocation and made the charge against each company; is that true? A. That is correct, yes, sir.

Q. That was all done without consulting any officer of any of the lines in the system. To put it specifically, the charges thus made against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company were made without consulting any officer of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. They were made without 447
referring the specific items to some officer of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Q. Now, take the direct charges to which you have referred as having the signatures of officers or employees of the Forty-second Street Company. Did those contain anything as to price should be charged? A. All requisitions for material were priced.

Q. The requisitions themselves were priced? A. When I first became connected with the New York

448 City Railway Company, in the storeroom they were copying the requisitions on to storeroom orders, and then those storeroom orders were sent out into the storeroom and the prices shown on these storeroom orders and the charges made on those ran from the original requisition. Later we cut out that additional work and put the prices on the original requisitions and made the charges from such requisitions.

Q. That is, your storekeeper when the requisition came in for, we will say, ten rails, from the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, would put the
449 price on the requisition itself? A. That is correct.

Q. Do you know John Beaver? A. I do.

Q. Did he hold any official position with the New York City Railway Company in 1907?

Mr. Whittlesey: I object to that unless the general nature of the official position is stated, because the minute books I think would be the best evidence, certainly as to officers and directors.

Mr. Bickford: I am going to put in the minutes to show who were the officers and directors, but I thought it would be best to ask Mr.
450 Brown if he knows.

A. Some of them I may know and some of them I do not. As to Mr. Beaver, I cannot answer definitely that question.

Q. Was he employed in some capacity in the office of the New York City Railway Company? A. Mr. Beaver did work for the New York City Railway Company.

Q. He received a salary from that company? A. That is my recollection.

Q. He had a desk up there in your office, hadn't he? A. He had a desk in the Cable Building.

Q. That is, in the general office of the New York 451
City Railway Company? A. The general offices of all the companies. Which particular square foot belonged to each company I cannot say.

By the Master:

Q. Who paid the rent of the general office? A. There was no rent paid for the general office, the property being owned by the Broadway and Seventh Avenue Railroad Company.

Q. Was there any charge made to the lessor companies for the use of the building, to the Forty-second Street, Manhattanville and St. Nicholas 452
Avenue Railroad Company, for instance? A. There was no charge made for any of the general offices.

Q. Do you know what duties Mr. Beaver performed for the New York City Railway Company? A. He performed a good many duties of various natures. One of his duties was the giving of bonds for employees that were arrested for making widows and orphans.

Q. He was a sort of a handy man, wasn't he, for the New York City Railway Company? A. He was, for all of the companies.

Q. Was John Byrns employed by the New York 453
City Railway Company? A. No, he was not.

Q. Do you know James I. Burke? A. James I. Burke, yes.

Q. Who was he? A. He is connected with the Morton Trust Company, trust officer I think his title was.

Q. John B. Johnson, do you know him? A. I do not know him.

Q. George W. Linch? A. George W. Linch, I know him, yes.

454 Q. Was he employed in any capacity by the New York City Railway Company? A. He was not.

Q. Reune Martin? A. He was not.

Q. Wasn't he employed in connection with various companies in the line, in the system? A. He was secretary and treasurer of the companies in the Bronx and Westchester County. I think he was a director of some of the companies on the Island of Manhattan. He was not an employee.

Q. He was an assistant secretary of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, wasn't he? A. If he
455 was, I have forgotten it.

By the Master:

Q. When you say he was a director, you mean of some of the companies? A. Of some of the companies, yes.

Q. You do not remember which one? A. No, I do not.

By Mr. Whittlesey:

Q. You do not know whether he was in the New York City directory? A. I could not say.

456 By the Master:

Q. When Mr. Bickford used the word "employees," he used it in the broad sense; an officer would be an employee? A. I would not consider a director being an employee.

By Mr. Bickford:

Q. I am referring to officers? A. Everything from the officers down. Directors are elected.

Q. Mr. Beaver was a director of various companies in the system, wasn't he? A. He was; but as to the companies I do not remember.

Q. Was John Byrns a director in any other company in the system except the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company; was he a director of the Dry Dock? A. I cannot remember; I think he was connected with another company, and may be more. 457

Q. Do you know about James I. Burke, whether he was a director in any other company? A. I do not.

Q. George W. Linch? A. George W. Linch was the secretary and treasurer of the Christopher and Tenth Street Railroad. Whether he had any connection with any of the other companies I do not know, as a director. I think he was a director. 458

Q. The road to which you have referred was in the system, the New York City Railway Company system? A. That was one of the lessor companies of the Metropolitan system.

Q. Was he in the Central Park, North and East River and Second Avenue also? A. My recollection is he was not. You are referring now to 1907, aren't you?

Q. Yes. Frank F. Ogston? A. Frank F. Ogston was in the employ of the New York City Railway Company, and at one time in the employ of the Metropolitan Street Railway Company, one of the lessor companies. 459

Q. As a real estate clerk? A. He was a real estate agent without the title.

Q. Do you know whether he was a director of any other company than the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. That I do not know.

Q. A. V. Porter, what was his connection with the New York City Railway Company? A. He was architect.

Q. Do you know whether he was a director of any other company than the Forty-second Street,

460 Manhattanville and St. Nicholas Avenue Railroad Company? A. I do not know.

Q. Thomas J. Reagan? A. I do not remember whether he was.

Q. Well, do you know whether he was employed by the New York City Railway Company? A. He was not.

Q. Was he the private secretary for Mr. Ryan or for Mr. Whitney, do you know? A. He was private secretary to somebody, but whom he was private secretary to I do not know. I have never met him.

461 By the Master:

Q. Somebody connected with the New York City Railway Company? A. No. I have had no business with him at all since I have been there.

By Mr. Bickford:

Q. Daniel H. Shea? A. He was never connected with the New York City Railway Company.

Q. Was he a private secretary for somebody? A. I believe he was private secretary to Mr. Thomas F. Ryan.

Q. Edwin Wolf? A. I do not remember Edwin
462 Wolf.

Q. Frank S. Gannon? A. Frank S. Gannon was at one time Vice-President of the New York City Railway Company, but not in 1907.

Q. Did he have any connection with the New York City Railway Company in 1907? A. I think he was a director only.

Q. Was he a director of other companies in the system? A. I think he was.

Q. W. A. Anderson? A. W. A. Anderson was connected with the New York City Railway Company.

Q. In what capacity? A. He was in 1907 secretary to the president. 463

Q. And had been secretary for some time? A. Not very long, no. Prior to that he was in the legal department.

By the Master:

Q. Is he the man who tried the transfer cases? A. No, he is now secretary to the receivers.

By Mr. Bickford:

Q. Oren Root, Jr., was general manager of the New York City Railway Company, was he not? 464
A. He was, and also general manager of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Q. And also of numerous companies in the system? A. Of numerous other companies, yes.

Q. Was he a vice-president of the New York City Railway Company? A. In 1907 he was, yes. He succeeded Mr. Gannon as vice-president.

Q. What was the connection of D. C. Moorehead with the New York City Railway Company? A. Up to July 1, 1907, he was the auditor of the New York City Road.

Q. And he occupied the position of what? A. 465
He was also the auditor of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Q. Assistant secretary and assistant treasurer?

Mr. Whittlesey: Of what company?

Mr. Bickford: Of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company.

A. I think he was auditor, too.

Q. He occupied that position subsequent to July,

466 1907, didn't he? A. Subsequent to July, 1907, what position to you mean?

Q. The positions which you have testified to? A. As auditor?

Q. Yes. A. No.

Q. Was he your predecessor as auditor? A. He continued as auditor after I came. I was his superior. He continued in practically the same position, except the direction of the office fell upon me rather than upon him.

By Mr. Whittlesey:

467 Q. Mr. Brown, what was your title from July 1, 1904, until July 1, 1907? A. From July 1, 1904, until October, 1906, my title was comptroller's representative; the comptroller was Mr. Charles S. Ludlam. He acted in a consulting capacity only, and I was his direct representative and acted for him.

By the Master:

Q. Were you the active head of the bookkeeping department of the entire railroad system? A. I was appointed as the specific head of the New York City Railway Company, and with the super-
468 vision over the accounts of the other companies, although I had no official appointment from the other companies.

Q. By virtue of your position with the New York City Railway Company, did you exercise and supervise the keeping of the books of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. Yes, sir; that is correct. Let me continue my answer. From October, 1906, to July 1, 1907, I had the title of comptroller, Mr. Ludlam resigning. After 1907 the accounting department was reorganized, and I was made general auditor.

By Mr. Bickford: 469

Q. During all of this period was Mr. Moorehead under you in the accounting department? A. He was; yes, sir.

Q. He occupied some position with numerous other companies besides the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. He did; he was secretary and treasurer of the Metropolitan Street Railway Company and had connection with the other companies that I do not remember at the present time.

Redirect-examination by Mr. Whittlesey: 470

Q. Mr. Brown, the charges which you have testified were made against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company for materials and supplies furnished to that company by the New York City Railway Company, were made as nearly at cost as it was practical to ascertain the cost, was it? A. That is correct.

Q. The charges to which Mr. Bickford has referred which were made against the defendant on a car mileage basis, are you familiar with the terms of the Third Avenue mortgage to the Morton Trust Company? A. I am. 471

Q. And you were at or shortly after the time that you became connected with the New York City Railway Company in July, 1904? A. I was.

Q. Is the same true as to the lease from the Third Avenue Railroad Company to the Metropolitan Street Railway Company, and from the Metropolitan Street Railway Company to the Interurban Street Railway Company? A. The leases, you mean?

Q. Yes, you were with those? A. I was and I am.

472 Q. Did you acquaint yourself with the lines of road operated by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. I did.

Q. In your opinion were the charges which were made to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company by the New York City Railway Company on a car mileage basis made upon a basis which was fair in all respects to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company?

Mr. Bickford: I object to that as incom-
473 petent, immaterial and irrelevant.

Mr. Borland: I join in that objection.

The Master: Objection sustained.

Mr. Whittlesey: You do not care to hear argument on it? I would like to show the witness is qualified as an expert.

The Master: I have no objection to it unless they object. If you think it important for the witness to state whether in his opinion such an arrangement was fair, I will let him state it for what it is worth.

Mr. Bickford: Noting my exception?

The Master: Yes.

474 Mr. Borland: I also note an exception.

Mr. Bickford: I add the further objection that he is not a disinterested witness, and his opinion is of no value.

The Master: That is, the system and plan for which he said he assumed responsibility was a fair one. Ask him if the charges were fair.

Mr. Holbrook: I think the facts are in evidence already.

A. I have always considered them on a fair basis.

Q. In your opinion would it have been more expensive to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company if that road had been obliged or had kept its operating departments entirely separate from those of the New York City Railway Company, so that it would have had to supply its own legal department and furnish its own supplies and materials independently of the New York City Railway Company? 475

Mr. Holbrook: I object to that question as based upon a hypothetical situation, and one which the witness is not qualified as a witness to testify to. 476

Mr. Bickford: I join in that objection, and for the further reason that that involves a question of operation, and this witness has not qualified as an expert.

Mr. Borland: I join in that objection.

The Master: I sustain the objection.

Exception by Mr. Whittlesey.

Q. On what basis were charges for electrical power against the defendant company made?

By Mr. Bickford: 477

Q. Do you know that as a matter of fact, Mr. Brown? A. I know it as a matter of investigation of the records.

Q. But you have no independent knowledge? A. I have no independent knowledge, no.

Mr. Bickford: I object to that. It is rather a complicated matter, and I do not think we should go into hearsay evidence.

Mr. Whittlesey: I want to get Mr. Brown's end of it, and I am going into the charges from the other end up.

478 Mr. Bickford: If there is any competent evidence Mr. Brown can give.

By Mr. Whittlesey:

Q. Mr. Brown, being in charge of the accounting department, you were aware of the fact that charges for electrical power were made against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company in this account, were you not? A. I was and am.

Q. They were made under your supervision, were they not? A. Those charges were, yes.

479 Q. Did you have data or information upon which to make such charges? A. I did.

Q. What data or information did you have? A. The report from the electrical engineer for the latter part of the period, and from the chief engineer—I am not sure whether it came from the chief engineer or the electrical engineer prior to that time.

By Mr. Bickford:

Q. Of the New York City Railway Company? A. Of the New York City Railway Company, yes.

480 By Mr. Whittlesey:

Q. Was Mr. Armstrong the electrical engineer for all or part of that period? A. For a part of the period, yes.

Q. What is Mr. Armstrong's full name? A. Mr. J. R. C. Armstrong.

Q. And it was from Mr. Armstrong in his capacity as electrical engineer that you received these reports? A. That is correct.

By the Master:

Q. What were the reports? A. Reports show-

ing the amount of power that had been consumed by the companies other than the New York City Railway Company, each month. 481

Q. Did the report show how much was consumed by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. Yes, sir.

By Mr. Bickford:

Q. By what means was that shown, by meters?

Mr. Whittlesey: We will get to that.

A. That is the question asked me before, and you objected to it. 482

By Mr. Whittlesey:

Q. These reports from the electrical engineer stated nothing about price, did they? A. They did not.

Q. At what price, if you know, was electrical power charged to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. My recollection is a cent and a half a kilowatt hour.

Q. Do you know how that price was arrived at? 483
A. A contract.

Q. Between the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company and what? A. Between the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company and the Metropolitan Street Railway Company or New York City Railway Company, I do not remember which.

By Mr. Bickford:

Q. When was that contract made? A. I do not remember.

484 By Mr. Whittlesey:

Q. Have you the contract or a copy of it in the office at 621 Broadway? A. I believe so.

Q. Are you familiar with the prices paid for electrical power in the City of New York during the last five or six years? A. I am not.

Q. And from the information contained in the reports that you received from the electrical engineer the charges were made at the rate of per kilowatt hour that you have specified against the several companies to whom power was shown to be furnished, including this defendant company? A.
485 It was made at various rates; rates were given to the different companies.

Q. It was made at the rate you have specified to this defendant company, under that contract? A. Yes, sir, that is correct.

Q. Are all of the interest charges in the account, of which a transcript has been marked for identification, charges composed of elements similar to that which you testified to with reference to the month of April, 1907? A. Those subsequent to July 1, 1904, are.

Q. The notes upon which a portion of that interest was computed and charged were notes which
486 had been given for construction work, were they not? A. They were.

Q. And the balances on open account upon which interest was so computed and charged, other than the interest on open account in favor of the New York City Railway Company, were balances on construction accounts, were they not? A. They were. I might amend that answer as to those notes. The records show that they were for construction; the notes were mainly issued prior to my connection, so I can only testify from the records.

Q. This account of which a transcript has been marked for identification is an operating account, is it not? 487

The Master: What do you mean by that, called an operating account on the books?

Mr. Whittlesey: It is an operating account.

A. From July 1, 1904, it is.

By the Master:

Q. Do you mean that the charges in that account were confined to charges paid for operating expenses? A. They were charges and credits arising from the operation of the property as differentiated from the construction. 488

Q. Interest was charged on that account on construction notes? A. That is correct, yes.

Q. On what theory was that done? A. Under the general practice in all railroad accounts.

Q. Charged as an operating expense?

Mr. Bickford: I object to that because this raises another question as to whether the New York City Railway Company was entitled to that interest. It goes further than that. I understand what Mr. Whittlesey wants to bring out, but there is the additional objection, it is not a proper item to be charged in that account. 489

The Master: In any account?

Mr. Bickford: Yes, in any account.

The Master: We are simply concerned with whether it is a proper charge. If it is not a proper charge as an operating expense, then we do not care whether it is a proper charge for any other purpose or not. If it is not a proper charge for any purpose, then it can go out.

490 Mr. Bickford: My contention is that the New York City Railway Company was not entitled to that interest on any possible theory, and therefore it is not a proper charge in that account. It may be an obligation of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, but it is not an obligation due to the New York City Railway Company.

The Master: What I want to get at is on what theory they consider a charge for interest on a construction note is a proper part of an operating account.

491 Mr. Bickford: I object to that as incompetent and immaterial.

The Master: I should think you would want to bring that out, because he said this whole account is an operating account.

Mr. Bickford: I withdraw the objection.

The Master: His answer could not possibly go to show the charge made was due to anybody; we are not assuming for the purposes of the argument that they have got a note that was given for construction account, regardless of whether the note was properly given and regardless of who was entitled to it. How does that charge get into an operating account, if you know?

492

The Witness: It is based upon the fundamental principle of keeping accounts. Your accounts are divided into two general classes, capital account and operating accounts. Capital accounts represent the cost of your property. Operating accounts represent your results from the operation of the property, whether the profits are greater or whether there is a surplus from operation, or

whether there is a deficiency from operation. The general rule fixed by the Interstate Commerce Commission, which was fixed after all the steam railroad auditors had passed on the question, was that the only interest chargeable to capital account was the interest on money borrowed for construction during the period of construction. As soon as the road was put in operation, then they were no longer chargeable to your capital account, but to operating account. For instance, a road issues its bonds for the cost of construction of its road. During the construction of the road when it is not operated the interest is chargeable to the cost of building. After that, you cannot charge to capital account, for you would be swelling your capital account and showing earnings applicable to dividends in excess of the true condition.

493

494

By the Master:

Q. The interest on the money that you may have borrowed, for instance, to build your railroad station? A. It applies to your operating account, or what is technically known as your income.

By Mr. Whittlesey:

495

Q. Are railroads required by the Interstate Commerce Commission rules to carry interest on construction charges and construction notes as an operating charge?

Mr. Bickford: I object to that. These railroads are not under the Interstate Commerce Commission.

The Master: You had better change the form of your question.

A. It is the fundamental principle of the accounts, regardless.

496 Q. That is a practice of all railroads, is it? A. It is the practice of all railroads whose accounts are properly kept.

By the Master:

Q. You mean all street railways? A. Street railways or steam railways, or any kind, I do not care what kind it is, if the books are properly kept.

Q. There appear in this account, of which a transcript has been marked for identification, charges for cash fares below Forty-fifth Street on Broadway. Do you know what the basis for that
497 charge is? A. There was a contract between the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company and the New York City Railway Company, the date of which I do not remember. One of the provisions stated that the New York City Railway Company received all the fares collected south of Forty-fifth Street on the Boulevard cars which operated or had the right to operate, I think, to Murray Street on Broadway.

Mr. Bickford: I think I had better note an objection to that and move to strike it out on the ground that the contract is in writing. Is
498 it not, Mr. Brown?

The Witness: It is.

Mr. Bickford: And that is the best evidence.

Mr. Borland: I join in that objection.

The Master: I think we have got it here.

Mr. Whittlesey: If we have got it here, I would like to offer it in evidence.

The Master: Here it is (producing paper).

Q. Is the contract which I show you, entitled, "Agreement," dated August 25, 1904, between the

New York City Railway Company and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, the contract to which you have referred (handing paper to witness)? A. This appears to be a copy of the contract. 499

Mr. Whittlesey: I offer it in evidence.

Mr. Bickford: Objected to as incompetent, irrelevant and immaterial. That is a contract made in 1904 between the New York City Railway Company and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company. The New York City Railway Company at that time held nearly all 500 of the outstanding capitalization of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company and was in a position to procure from that company any contract that it saw fit, and it seems to me that under those circumstances the contract has no probative force whatever.

Mr. Borland: I join in that objection.

The Master: I will overrule the objection and let the contract in.

Exception by Mr. Bickford.

Exception by Mr. Borland.

The Master: Received subject to a motion 501 to strike out.

Marked Claimant's Exhibit K, Nov. 4, 1909.

Q. The charges for cash fares below Broadway, then, which appear in this account, are based upon that contract? A. That is correct.

Q. And how are the number of cash fares, the amount of cash fares, month by month, determined? A. They were made up from the conductors' tally cards, the conductor reading his register those south bound and those north bound at Forty-

502 fifth Street and when the car crossed Forty-fifth Street, that information was made up from the conductor's tally cards in my office.

Q. In your opinion were charges for cash fares made against the defendant pursuant to that contract, or purporting to be pursuant to that contract, proper operating charges? A. In my opinion, yes, for the reason that the New York City Railway Company considered those cash fares south of Forty-fifth Street as being cash fares of the New York City Railway Company, and an operating revenue.

503 Q. That is, in view of the contract? A. Yes, sir.

Recross-examination by Mr. Bickford:

Q. You stated, Mr. Brown, that the different companies in the system are charged different prices for power furnished? A. That is correct.

Q. Do you know what the charge to the Dry Dock was? A. The charge to the Dry Dock Company was one cent a kilowatt hour.

By the Master:

Q. What did you say as to this company? A.
504 1½ cents.

By Mr. Bickford:

Q. The Dry Dock lines are situated farther from the power houses than the Forty-second Street lines, are they not? A. That is a question that I do not feel qualified to answer.

Q. There is no place that the Forty-second Street lines extend below Thirty-fourth Street, is there? A. No.

Q. And the Dry Dock lines, there are electric lines of the Dry Dock Company below that line? A. Yes, sir. 505

Q. As far south as Grand Street?

Mr. Whittlesey: I object to this line of testimony. It does not appear that it is any more expensive.

The Master: I will overrule the objection.

Exception by Mr. Whittlesey.

A. Yes. sir.

Q. There were two power houses in the system, were there not, at that time? A. There were.

Q. Where were they located? A. One at Kingsbridge, and the other at Ninety-sixth Street and First Avenue. 506

Q. The Kingsbridge plant belonged to the Third Avenue Railroad? A. It did.

Q. And the other plants belonged to the Metropolitan Street Railway Company? A. It did.

Q. Do you know from which plant this power for the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company was taken? A. I am not positive, but I think it came from both.

Q. Do you know whether there is a loss in transmission of power proportionate to the distance it is transmitted? A. That is an electrical engineering matter that I do not feel qualified to testify in relation to. 507

Q. Do you know what kind of power was supplied? A. Direct current.

Q. That is, the cent and a half charge to the Forty-second Street Company was for direct current? A. Yes, sir.

By the Master:

Q. And the charge against the Dry Dock was for the same? A. It was.

508 By Mr. Bickford:

Q. A direct current is more expensive than an alternating current, isn't it? A. Yes, sir.

Q. Because of a large loss in transmitting?

Mr. Whittlesey: I object to it.

Mr. Bickford: All right; I do not care for it.

Q. You have spoken of allocating these charges for cars to the different companies and you have said that your charges against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company were based entirely upon the
509 reports made by the electrical engineer? A. That is correct.

Q. You had no personal knowledge of the means adopted by him in ascertaining how much power had to be used by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. I have knowledge as to the method used by him.

By the Master:

Q. All you know about the amount used was he told you the amount in his report, and you made
510 a charge based upon that? A. I also knew the method he used in arriving at that figure.

The Master: This is no proof that the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company got the service stated in the report; it is hearsay.

Q. You stated one thing in connection with that item of interest which I meant to have asked you, and which I overlooked. You say that you made certain deductions from the interest or from the amounts upon which the interest was computed.

What was the purpose of that? A. It was a deduction for the amount of interest which previously had been charged in the account. 511

Q. To prevent compounding? A. That was practically the reason; the basis of it.

Q. As I understand it, all interest which was charged against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company was charged in this account, the transcript of which has been marked for identification? A. All the interest, yes. My testimony relates entirely subsequent to July, 1904.

Q. We will limit your testimony to the period you kept the books? A. That is true. 512

Q. You computed interest upon the balance shown monthly on that account, did you not? A. On which account?

Q. This account, a transcript of which has been marked for identification? A. That is true.

Q. But you deducted from that the amounts which had been previously charged in that account for interest before ascertaining the amount upon which you computed your new amount of interest? A. That is correct.

Q. Isn't there such a thing in keeping accounts of railway companies, as income account? A. There is. 513

Q. Isn't that a broader account, doesn't that apply to all accounts affecting income as distinguished from capital? A. It does, substantially it does.

Q. Is not the fundamental distinction between capital and income rather than between capital and operating accounts? A. Well, your income and your operating accounts are substantially the same. Your income is the net result of your profits.

514 Q. So your income account is broader than your operating account? A. In my opinion, no. Of course it depends upon the distinction you place upon operations. If you are going to construe operations to mean operating expenses that is included, that is income. As a general thing, they speak of operations the same as we do of income. Anything that was technically an expense would be.

By the Master:

Q. That is, the word "operating" would not
515 add anything? A. Why, yes, it would add something, because it defines within the income where it goes. You have as an expense the interest on your bonds, which is not an operating expense, technically, under the classification of the accounts, but a deduction from income.

Q. But, strictly speaking, the operating expense is an expense arising from the actual operation of the road, that is, for the payment of employees engaged in operation, and expense of that character, is not that so? A. It is. It may be made a little clearer than that. The operating expenses are the expenses of the operation necessary to
516 produce your revenue.

Q. That is right. Interest on indebtedness does not come within that classification, does it? A. It does not come within the classification of operating expense, no.

Q. But it is a charge against income? A. That is correct.

Q. And it is to be deducted from your income before determining your net income? A. That is true.

Q. But it is not properly an operating expense? A. That is correct, that is, using operating expense in the narrow, technical way.

Q. In determining your net income, there is a 517
distinction between operating income and income from other sources? A. There is.

Q. And isn't it customary for railroads to state first their operating income account, that is, what they have received from operation, deducting therefrom what is paid out for operation, showing a balance which is called something equivalent to an operating expense? A. We call it net earnings.

Q. Then from that, to ascertain your real net earnings, you deduct taxes and interest; is not that so? A. No, you add to that your income from 518
other sources, which is your income from property not used in the operation of the roads, and that gives you your gross income, and from that gross income you deduct your taxes, and your interest on your bonds, and your rentals.

Q. And interest on funded debts also? A. And interest on funded debts also.

By the Master:

Q. Then would you say the revenue received under the contract for cash fares was operating revenue? A. Yes, on the view of the contract and 519
the method of carrying it out; in other words, the cars were considered after they passed Forty-fifth Street as being New York City Railway Company cars under that contract, and therefore any revenue that came from those cars, why, they were cars of the New York City.

Q. I thought the other railroad ran through under a license and this was a consideration paid for that license? A. Well, that is substantially true; it is also true in my opinion that you can consider it the other way.

520 By Mr. Bickford:

Q. Who paid for the power and for the platform men below Forty-fifth Street? A. The platform men were paid by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, and the power was furnished by the New York City Railway Company, and the tracks were maintained by the New York City Railway Company.

Q. But the New York City Railway Company took all of the fares which were collected below Forty-fifth Street? A. That is correct; yes, sir.

521

By the Master:

Q. You would not say the New York City Railway Company were operating the cars below Forty-fifth Street? A. For the purposes of accounting, in my opinion they were.

By Mr. Bickford:

Q. Who paid for the cost of the repairs on those cars? A. The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Q. And there was no allowance made for the fact
522 that the cars operated for a considerable distance below Forty-fifth Street? A. None.

By the Master:

Q. They were operated by employees of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, and the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company was liable for any damage the car did below Forty-fifth Street or a Forty-fifth Street fare by virtue of a license? A. That is true, they were liable for any damages south of that.

Q. And they were operating those cars? A. Yes, sir. 523

By Mr. Bickford:

Q. And the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company was charged with any payments made for damages occurring below Forty-fifth Street, was it not? A. According to my recollection, yes.

Q. Mr. Brown, were the expenses of the legal department in connection with accident cases, charged against the Third Avenue Railroad Company upon a car mileage basis, that is, its proportion or a proportion? A. There were no charges made against the Third Avenue Railroad Company for injuries and damages since July 1, 1904. 524

The Master: That is not the question, is it?

Q. (Repeated) Why were not the expenses of the legal department in connection with the accident cases charged against the Third Avenue Railroad Company upon a car mileage basis, that is, its proportion or a proportion? That was because the Third Avenue was leased? A. That is correct.

Q. Do you know as matter of fact whether the accidents upon the Third Avenue Railroad line are more numerous and of a more serious character than on the Forty-second Street? 525

Mr. Whittlesey: I object to that as incompetent and irrelevant.

The Master: I overrule the objection.

Exception by Mr. Whittlesey.

A. I prepared a statement some time ago in relation to that question, and we showed that the accidents were greater in number in proportion.

526 By the Master:

Q. You made a personal investigation in preparing that statement and ascertained that fact? A. I ascertained that fact; yes, sir.

By Mr. Bickford:

Q. Isn't it a fact that such claims are more numerous and more serious in the case of all the lines which run under the elevated structure? A. That is true, yes.

Q. Now, in ascertaining your car mileage basis, how did you get at it? A. Well, of course, you
527 cannot take any specific account; if you are going to use a car mileage basis all through, it is a general proposition that you take the general accounts of the nature that the New York City pro rated among the various companies, take them all, and in my opinion they will vary generally in proportion to the car mileage.

Q. That is not the question. I want to get at what the car mileage is, how you arrive at car mileage apportionment of any items? A. I do not understand that question.

Q. I want to get at what the car mileage is, how
528 you arrive at any car mileage apportionment? A. You wish to know how we arrive at car mileage?

Q. Yes. A. Car mileage is ascertained from the day cards of the conductors; the conductors show on their day cards the trips that they make, showing each individual trip and between what points, and from those day cards are compiled the mileage for each route each day. That information is supplied at my office, at the general office, and is prepared in the general division offices.

Q. In apportioning items upon a car mileage basis, you take such proportion of the items as is represented by the proportion of the car miles

on a particular route, such proportion as it bears to the total car mileage of the whole system? A. That is correct, yes, sir. 529

Q. Now, is it not a fact that the number of passengers carried in a car has something to do with the number of accidents? A. That is a technical operating question that I do not— In my opinion it may be and it may not be.

The Master: In other words, this basis of operation is arrived at regardless of the number of passengers that are carried?

Mr. Bickford: Yes.

530

Q. That is a fact? A. That is true.

Q. And from your experience in the New York City Railway Company, are you or are you not able to state whether the number of passengers carried in a car affects one way or the other the number of accidents occurring? A. I am not in a position to state.

Q. Do you know whether a large part of the accidents occur from passengers getting on and off cars? A. Yes, a large part of the accidents.

The Master: I think we all know that. We can take judicial notice.

531

Mr. Bickford: Accidents occurring in the street are a small proportion, as I understand, of it. Most of them occur from passengers getting on and off.

Q. Now, the number of passengers carried affects to a certain extent the expense of accounting, doesn't it? A. Not materially.

Q. Well, isn't it more difficult, and doesn't it take more employees to account for one million fares than it does two hundred thousand? A. Why, yes, such a comparison as that.

532 By the Master:

Q. What you mean is, if a conductor turns in $100, it is just as easy to account for it as if he turned in $20? A. Yes, sir. Of course it varies in proportion to the business done, as your business done varies in proportion to your mileage if the road is properly operated.

By Mr. Bickford:

Q. As a matter of fact, Mr. Brown, is not a car mileage basis or apportionment the last resort of the accounting department in railroad companies?
533 A. I do not know as you would call it a last resort. It is a resort that is very frequently accepted. There are objections to it, probably, as there are objections to any basis anybody wants to propose. Now we can find ten objections to any you want to propose.

Q. That is a system that is seldom used excepting in cases where you cannot make a definite apportionment? A. That is true; yes, sir.

Q. The amount of power consumed varies, of course, with the number of cars operated? A. With your car mileage.

534 Q. Aren't there other elements as to the character of the road, whether it is hilly or level? A. Of course that would have more or less effect; where you have to consume some power going up a hill, you consume less going down.

By the Master:

Q. Does it take more power to run a full car than an empty car? A. Not appreciably. These are things I gathered from the investigation and the experience of our officers up there.

Q. It takes more power to operate over a line

where there are many curves than over a straight one? A. That is true? 535

Q. And it takes more power to operate a large car than a small one? A. Well, as a general proposition, yes.

Q. It takes more power to operate one of your large pay-as-you-enter cars than it did the old standard box car? A. That is true, but we had no pay-as-you-enter cars in the period which we are investigating.

Q. But during that period you did have cars of different sizes? A. Yes, sir, some different sizes, and different types of motors.

Q. And a large car, of course, carries more passengers than a small car? A. Yes, sir, it might; it does not necessarily follow. 536

Q. It has a greater capacity? A. It has a greater capacity, yes.

Q. The car mileage basis does not take into consideration the number of passengers whatever? A. Only in this way, that as a general rule they operate the cars in proportion to the passengers to be carried; in other words, there are times in the day when there are few passengers or fewer passengers, and they operate fewer cars; and when they have more passengers they operate more cars. 537

Q. It does not take into account the actual number of passengers carried? A. It does not take into account the actual number of passengers carried.

Q. And it does not take into account the character of the route? A. No, sir.

Redirect-examination by Mr. Whittlesey:

Q. This car mileage basis, Mr. Brown, was used in order to arrive at the most convenient and

538 fairest average basis for charges where it was impossible to make direct charges; is that correct? A. That is correct.

Q. Broadly speaking, you would still say, would you not, that interest or construction charges are an operating expense? A. After the period of construction, after the road is in operation, but not using the term operating expenses in the technical way as defined by the Public Service Commission.

Q. I mean that? A. That is an income charge.

By the Master:

539

Q. He did not ask you if it was an income charge. Is it an operating expense? A. Well, a technical expense, it is not; but the charge under the general classification that I made of operating, differentiated from your capital.

By Mr. Bickford:

Q. Let me ask you this, interest is not an operating charge under the classification of the accounts by the Public Service Commission for the First District, is it? A. It is not included in the operating expense, but is included as a charge against the income from operation.

540

The Master: We do not care anything about that.

The Witness: Using operation as used by those not technically familiar with it.

Adjourned to Saturday, November 6, 1909, at 11 A. M.

New York, November 6, 1909. 541

Met pursuant to adjournment.

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, Receiver of the New York City Railway Company. (GEORGE N. WHITTLESEY, of Counsel.)

BOWERS & SANDS, Solicitors for the Central Trust Company. (MIDDLETON S. BORLAND, of Counsel.)

MERRILL & ROGERS, Solicitors for F. W. Whitridge, Receiver of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company. (MIDDLETON S. BORLAND, of Counsel.) 542

EVARTS, CHOATE & SHERMAN, Solicitors for F. W. Whitridge, Receiver of the Third Avenue Railroad Company. (HERBERT J. BICKFORD, of Counsel.)

Mr. Whittlesey not being prepared to proceed to-day, Mr. Bickford offers to put in some evidence out of its course.

543

HARDIE B. WALMSLEY, called as a witness on behalf of the Receiver of the Third Avenue Railroad Company, being duly sworn, testifies as follows:

Direct-examination by Mr. Bickford:

Q. Mr. Walmsley, what is your business occupation? A. I am an attorney employed in the office of Evarts, Choate & Sherman.

Q. Have you procured from the Central Trust Company, of New York, as Trustee under the

544 First Consolidated Mortgage of the Third Avenue Railroad Company, the Certificate Book of the Forty-second-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. I have, yes, sir.

Q. What period does that cover? A. It covers a period from December 14, 1898, to January 17, 1908.

Mr. Bickford: I offer that Certificate Book in evidence, but merely as a foundation for the testimony of Mr. Walmsley from the book.

Mr. Whittlesey: I object to the evidence as
545 incompetent and irrelevant. It does not as yet appear for what purpose the Certificate Book is offered.

Mr. Bickford: It is offered to show the ownership of the stock of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company.

The Master: Objection overruled.

Exception by Mr. Whittlesey.

Marked Receiver of Third Avenue Railroad Company, Exhibit 1, Nov. 6, 1909.

Mr. Holbrook: I desire to join in the offer of evidence made by Mr. Bickford.

546

Q. Have you examined that book, and are you able to state when the stock which belonged to the Third Avenue Railroad Company at the time of the execution of the First Consolidated Mortgage was transferred of record? A. I have examined the book, sir, and from that examination I am able to state when the transfer was made of the Third Avenue Railroad Company stock to the Morton Trust Company.

Q. When was that transfer made? A. The 547
transfer was made June 25, 1900.

Q. What certificates were then surrendered? A. The certificates standing in the name of the Third Avenue Railroad Company, as follows:

No. 1841 for 48 shares
No. 1837 for 31 shares
No. 1836 for 31 shares
No. 1793 for 16 shares
No. 1789 for 1000 shares
No. 1790 for 1000 shares
No. 1791 for 1000 shares
No. 1792 for 500 shares 548

and also for J. Ellis Tailer's certificate No. 1886, for 13,000 shares. For these various certificates surrendered, No. 1900 was issued to the Morton Trust Company, as Trustee, for 16,591 shares.

Q. Will you state the form of the registration of the new certificate that was issued to the Morton Trust Company? A. The new certificate was registered in the name of the Morton Trust Company, as Trustee.

Q. When was that certificate surrendered and canceled? A. It was surrendered and canceled on January 4, 1908. 549

Q. So far as appears from those books, was that certificate outstanding from June, 1900, until January, 1908? A. It was, yes, sir.

Q. Have you also produced the stock ledger of the Forty-second Street Road covering this same period? A. I have, yes, sir.

By Mr. Whittlesey:

Q. From whose custody? A. From the custody of the officers of the Central Trust Company.

550 By Mr. Bickford:

Q. Will you turn to the account in that book with the Third Avenue Railroad Company, page 439? A. Yes, sir.

Mr. Bickford: I offer that account in evidence.

Mr. Whittlesey: I object to the testimony offered as incompetent and irrelevant.

Mr. Bickford: You do not question that it is a genuine book?

Mr. Whittlesey: I do not question that it is a genuine book.

551 Mr. Bickford: You do not question the proof of the book or the entries therein?

By Mr. Whittlesey:

Q. Mr. Walmsley, from what data is this ledger posted, if you know? A. That information I have not, but probably from the certificate book. It coincides with the stubs of the certificates.

Q. Have you compared the entries upon this page 439 of this book, purporting to be the Third Avenue Railroad Company's account, with the certificate book? A. So far as the certificate book

552 which was in the possession of the Central Trust Company, and which I have produced, permits. That book only covers from certificate No. 1830 to certificate No. 2000.

Q. And the certificates referred to on this page go back to certificate No. 1726, do they not? A. They do, yes.

Q. And for the year 1896? A. Yes, 1896.

Mr. Whittlesey: I do not object to the sufficiency of the proof, subject to correction, if it is found to be inaccurate. I do object to the

competency of the testimony on the ground that it is irrelevant to the issues before the Master. 553

The Master: You object to it on the ground that it is irrelevant, and not on the ground that the proof is not competent?

Mr. Whittlesey: Yes.

The Master: Objection overruled.

Exception by Mr. Whittlesey.

Marked Receiver of Third Avenue Railroad Company, Exhibit 2, Nov. 6, 1909, and the following is a copy thereof:

554

555

558

3RD AVENUE R. R.

1896			
Feby. 8	F. W. Day, E. H. Dodd & C. H. Wilcox	1726	1000
" "	Jacob Fleisch, Lauer & Bro.,	1727	1000
" "	Jacob Fleisch, Lauer & Bro.,		
" "	Jacob Fleisch, Lauer & Bro.,		
	J. S. Foster, Julius Fleischauer & C. H. Wilcox,	1728	1000
		1729	1000
" "	John S. Foster,	1730	1000
" "	John S. Foster,	1731	1000
" "	John S. Foster,	1732	1000
" "	J. S. Foster & R. V. Harnett,	1733	1000
" "	J. S. Foster or C. F. Naething,	1734	1000
" "	J. S. Foster or C. F. Naething,	1735	1000
" "	C. F. Naething, G. A. Wylie, J. S. Foster or C. F. Naething,	1736	1000
" "	J. Haight, R. V. Harnett, C. F. Naething, C. F. Naething, W. H. Naething,		
	R. V. Harnett,		
	W. H. Naething, C. F. Naething, M. S. Paine, D. D. Wylie, W. M. Wylie,	1737	1000
	W. S. Paine, W. H. Naething,	1738	1000
	D. D. Wylie,		

557

A/c Cr.

3RD AVENUE R. R.

1900			
Feby 16	J. Ellis Taylor	1726	1000
" "	J. Ellis Taylor	1727	1000
" "	J. Ellis Taylor	1728	1000
" "	J. Ellis Taylor	1729	1000
" "	J. Ellis Taylor	1730	1000
" "	J. Ellis Taylor	1731	1000
" "	J. Ellis Taylor	1732	1000
" "	J. Ellis Taylor	1733	1000
" "	J. Ellis Taylor	1734	1000
" "	J. Ellis Taylor	1735	1000
" "	J. Ellis Taylor	1736	1000
" "	J. Ellis Taylor	1737	1000
" "	J. Ellis Taylor	1738	1000
			13000
	Jos. J. Traynor,	5	
June 25			
	Frank B. Rollins,	5	
	Henry A. Heimley,	5	
	Wm. K. Ryan,	5	
		—1832	20

556

A/c.

1898			
Jany 21	Cornelius Vanderbilt, Trustee,	1789	1000
" "	Cornelius Vanderbilt, Trustee,	1790	1000
" "	Cornelius Vanderbilt, Trustee,	1791	1000
" "	G. H. Prentiss & Co., W. W. Walsh, Jr., D. D. Wylie, R. W. Fairchild, G. W. Lewis,	1792	2500
" "	W. W. Walsh, Jr., H. N. Curtiss,	1793	1600
Dec. 23	Lippman Altmeyer,	1832	20
1899			
Jany. 4	Maxwell & Scoville,	1836	31
" 20	Otto A. Deandt, Chas. Gregory, Williamson & Squire,	1837	31
Feby. 16.	Wm. W. Goodrich,	1841	48

561

Frank B. Jackson,	5		
Thos. Robbins, Jr.,	5		
J. Sanford Barnes,	5		
Thos. J. Reagan,	5		
Daniel J. Shea,	5		
Jno. B. Johnson,	5		
Pierce Jay,	5		
Morton Tr.Co.,Tr.	13		
	—1841		48
Morton Tr. Co., Tr.	1837		31
	1836		31
	1793		16
	1789		1000
	1790		1000
	1791		1000
	1792		500
			16646

560

559

562 By Mr. Bickford:

Q. Is there an account in that book with the Morton Trust Company, as trustee? A. There is, yes, sir.

Q. Will you turn to that, please? A. Yes, sir. At page 302 appears the account of the Morton Trust Company, as trustee.

Mr. Bickford: I offer that in evidence.

Q. Mr. Walmsley, have you compared the entries in this account on page 302 with the entries in the certificate book? A. I have, yes.

563 Q. And does this page appear to be posted from the certificate book? A. The entries on this book coincide with the stubs of the certificates.

Mr. Whittlesey: I would like to reserve the right to have the entries on this book corrected to correspond with the facts, if it is found they do not now correspond with the facts, and make the same objection to receiving this page in evidence on the ground that it is incompetent and irrelevant.

The Master: He consents to it, subject to his right to contradict, and he objects to it

564 as irrelevant and the whole objection is overruled.

Exception by Mr. Whittlesey.

Marked Receiver of Third Avenue Railroad Company, Exhibit 3, Nov. 6, 1909, and the following is a copy thereof:

565

1908				
Jan. 3	1900.....	16591		
"	1907.....	50		
	1908.....	5		

MORTON TRUST COMPANY, TRUSTEE.

1900				
June 25	The Third Ave. Railroad Co.....	3591		
"	J. Ellis Taylor.....	13000	19000	16591
Dec. 7	Henry Hart	4		
	Jno. E. Parsons	4		
	" Edw. Lauterbach ...	4		
	" Albert J. Elias.....	4		
	Chas. Remsen.....	4		
	" Henry Iden	4		
	D. C. Andrews.....	4		
	" G. H. Leavitt	4		
	Jno. H. Wagdell.....	4		
	Alex. Hadden	4		
	" Samuel Riker	4		
	" Henry Hart	1		
	" Jno. E. Parsons.....	1		
	" Edw. Lauterbach	1		
	Chas. Remsen.....	1		
	" Henry Iden	1		
	Albert J. Elias.....	1	1907	.50
	" D. C. Andrews.....	1		
	G. H. Leavitt	1		
	" Jno. H. Wagdell....	1		
	Alexander Hadden ..	1		
	" Samuel Riker	1	1908	5

566

567

By Mr. Bickford:

Q. Are you able to state who were the stockholders of record of the Forty-second Street Company as shown by the certificate book which you have introduced on April 30, 1907? A. I can so state, yes, sir.

Q. Will you please state that? A. Yes, sir. They were as follows:

568 STOCKHOLDERS ON JUNE 30, 1900, AS SHOWN BY CERTIFICATE BOOKS IN POSSESSION OF CENTRAL TRUST COMPANY.

	Holder	*Date Issue*	*Cert. #*	*# Shares*	*Date Cancellation*
	Morton Tr. Co. as Trustee	June 25/00	1900	16591	Jan. 4/08
	John B. Johnson...	"	1898	5	"
	Danl. H. Shea....	"	1897	5	"
	Thos. J. Reagan...	"	1896	5	"
	John Byrnes.....	Feb. 16/99	1852	4	"
	" "	Nov. 18/97	1783	1	" 24/08
	Jno. Beaver.....	Jan. 19/00	1883	5	Uncancelled.
	Josephine L. de Forest	June 1/96	1744	30	Jan. 30/03
	Jno. P. Huggins..	Dec. 5/89	1022	25	Aug. 19/03
569	Lillie G. Lewis....	Dec. 14/98	1830	50	Dec. 17/02
	Louise Schultz....	" "	1831	75	Aug. 19/03
	Saml. Riker	Dec. 23/98	1833	1	Dec. 7/00
	Maxwell & Scoville	Dec. 29/98	1835	3	Dec. 17/02
	" "	Jan. 30/99	1839	15	" "
	Jno. D. Crimmins.	Feb. 15/99	1840	200	" "
	Henry Hart	" 16/99	1842	4	Dec. 7/00
	Jno. E. Parsons..	" "	1843	4	" "
	Edw. Lauterbach..	" "	1844	4	" "
	Albert J. Elias	" "	1845	4	" "
	Wm. H. Webb....	" "	1846	4	" "
	Chas. Remsen ..	" "	1847	4	" "
	Henry Iden	" "	1848	4	" "
	David C. Andrews	" "	1849	4	" "
	G. H. Leavitt.....	" "	1850	4	" "
	J. H. Waydell....	" "	1851	4	" "
	Alex. Hadden	Feb. 16/99	1853	4	Dec. 7/00
570	Sml. Riker	"	1854	4	" "
	J. D. Crimmins...	Feb. 18/99	1855	100	Dec. 17/02
	W. B. Fonda & Co.	Mch. 1/99	1856	50	Dec. 18/01
	Rosalie Guiterman	Mch. 14/99	1857	25	Dec. 17/02
	Alice Lehmann ...	" "	1858	10	" "
	Jno D. Crimmins..	Mch. 21/99	1860	165	" "
	David Pettigrew..	Apr. 6/99	1861	11	" "
	Kate E. Pettigrew	"	1862	11	" "
	G. A. Gabay	"	1863	11	" "
	J. R. Pettigrew....	"	1865	21	" "
	Susan Dyckman ..	Apr. 11/99	1866	10	" "
	Josephine Schmidt	" 13/99	1867	50	" "
	F. E. Switzer.....	May 15/99	1868	50	" "
	A. Schiff & Co....	" 19/99	1869	15	" "
	S. M. Phillips.....	June 19/99	1871	40	" "
	" " "	"	1872	50	" "
	A. Lewis	Jan. 26/99	1873	5	" "

571

Holder.	*Date Issue.*	*Certf. #*	*# Shares*	*Date Cancellation*
A. Schiff & Co....	Jan. 27/99	1874	10	Dec. 17/12
Maxwell & Scoville	" 21/99	1876	82	" "
Wm. Laimbert	Oct. 9/99	1877	25	" "
Henry Clews & Co.	"	1878	5	" "
James R. Pettigrew	" 31/99	1879	11	" "
Chas. Gregory	Nov. 20/99	1880	50	" "
E. J. "	Dec. 6/99	1882	50	" "
Jno. Adler	Jan. 22/00	1884	25	" "
R. B. Mitchell....	Feb. 15/00	1885	28	" "
Maxwell & Scoville	" 21/00	1887	50	" "
Maxwell & Scoville	Feb. 21/00	1888	50	Dec. 17/02
F. S. Rollins	Jan. 25/00	1890	5	Jan. 20/06
H. A. Himely....	"	1891	5	Feb. 2/05
W. K. Ryan	"	1892	5	Jan. 28/01
F. B. Jackson....	"	1893	5	Jan. 20/06
Thos. Robins, Jr...	"	1894	5	Jan. 28/04
Sanford Barns	"	1895	5	Jan. 16/06
T. J. Reagan.....	"	1896	5	Jan. 24/08
Danl. H. Shea.....	"	1897	5	"
J. B. Johnson.....	"	1898	5	"
Pierre Jay	"	1899	5	Jan. 28/04

572

Q. Will you also state from the same source who were the stockholders of the Forty-second Street Company of record on June 30, 1907? A. I can, yes, sir.

Q. Please state them? A. They were as follows:

573

STOCKHOLDERS 42ND STREET R. R. CO. ON APRIL 30/07.

Holder	*Date*	*Ctf. No.*	*No. Shares*	*When Cancelled*
John Beaver	Nov. 24/06	1993	15	Uncancelled
John Beaver	Jan. 19/00	1883	5	"
H. V. Porter.....	July 12/06	1992	5	Jan. 23/08
F. S. Gannon.....	" "	1991	5	"
J. I. Burke.....	" "	1990	322	Uncancelled
"	" "	1989	812	"
"	" "	1988	33	"
"	" "	1987	67	"
"	Nov. 24/06	1986	100	"
"	" "	1985	100	"
"	" "	1984	100	"
"	" "	1983	100	"

574

Holder.	*Date.*	*Ctf. No.*	*No. Shares*	*When Cancelled*
J. I. Burke.....	Nov. 24/06	1982	100	Uncancelled
"	" "	1981	100	"
"	" "	1980	100	"
"	" "	1979	100	"
"	" "	1978	100	"
"	" "	1977	100	"
"	" "	1976	40	"
"	" "	1975	71	"
"	" "	1974	100	"
"	" "	1944 to 1972 inc.	100 ea. 2900	"
"	" "	1932	2200	"
W. A. Anderson..	Jan. 17/06	1929	5	"
G. W. Linch	Jan. 17/06	1928	5	Jan. 23/08
J. I. Burke.....	July 17/05	1927	45	"
575 "	" "	1926	55	Uncancelled
Edwin Wolf.....	Mar. 2/04	1925	5	July 2/07
Frank F. Ogston..	Jan. 21/04	1924	5	Jan. 23/08
E. J. Hatch.....	" "	1922	5	"
H. H. Vreeland..	Aug. 18/03	1921	100	Uncancelled
" ..	Jan. 17/03	1920	30	"
Chas. E. Warren..	Dec. 16/02	1919	25	"
A. Gutman	Dec. 19/01	1917	37	"
H. H. Vreeland...	Dec. 17/01	1916	87	"
" ...	" "	1915	100	"
Sol. L. Cohen.....	Nov. 27/01	1913	13	May 2/07
Webster Wagner..	Apr. 10/01	1912	34	Uncancelled
Josephine L. Disbrow	"	1911	33	"
" "	"	1910	33	"
Reune Martin	Dec. 28/00	1909	5	Jan. 23/08
576 Morton Trust Co. Trustee	Dec. 7/00	1908	5	Jan. 4/08
" "	" "	1907	50	"
" "	June 25/00	1900	16591	"
John B. Johnson..	"	1898	5	Jan. 24/08
Daniel H. Shea....	"	1897	5	"
Thos. J. Reagan...	"	1896	5	"
John Byrns	Feb. 16/99	1852	4	"

Mr. Bickford: I also offer in evidence the following extract from the minutes of the Annual Meeting of the Stockholders of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held

January 18, 1900, showing the election of the following persons as directors: 577

"That Henry Hart, John E. Parsons, David C. Andrews, Edward Lauterbach, G. Howland Leavitt, Albert J. Elias, John H. Waydell, John Beaver, John Byrns, Charles Remsen, Alexander Hadden, Henry Iden and Samuel Riker, having each received a majority of all the votes cast were duly elected and are hereby declared to be elected Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company for the ensuing year."

578

Mr. Whittlesey: I object to the evidence offered as incompetent and irrelevant.

The Master: On what ground is it incompetent?

Mr. Whittlesey: It seems to me we are here concerned with a claim of the New York City Railway Company against the defendant. That claim does not go back, certainly, before the lease with the New York City Railway Company in 1902, and this evidence is offered to show who were elected the directors of the defendant back in 1900.

The Master: That objection is it is not relevant. The objection is overruled. 579

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of a meeting of the Board of Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 25, 1900, whereby it appears that the following persons were elected officers of the company:

President, Albert J. Elias; Vice-President,

580 Henry Hart; Secretary and Treasurer, D. C. Andrews.

Mr. Whittlesey: I make the same objection that the evidence offered is irrelevant and immaterial.

The Master: The objection is overruled.

Exception by Mr. Whittlesey.

The Master: I am overruling your objection on the theory that it is directed to the materiality and relevancy, rather than it is not competently offered. You do not object to it upon the ground that it is hearsay, or anything like that?

581 Mr. Whittlesey: I do not. I do not question the fact that these gentlemen were elected to the offices on that day, but I object to the materiality of that fact.

Mr. Bickford: I also offer in evidence the following extract from the minutes of a meeting of the Board of Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held March 3, 1900, whereby the incumbency of Mr. D. C. Andrews, as Secretary and Treasurer of the Company, was terminated, and Thomas A.

582 Maher was elected Secretary and Treasurer, and the resignation of Albert J. Elias was accepted, and John Beaver was elected President in his stead.

Mr. Whittlesey: I object to the evidence on the ground that the facts sought to be proved are immaterial and irrelevant.

The Master: The objection is overruled.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of a meeting of the Board of Directors of the Forty-second Street, Manhattanville and St. Nich-

olas Avenue Railroad Company, held June 27, 1900, whereat the resignation of Samuel Riker as a director was accepted, and Frank B. Jackson was elected in his stead. 583

The resignation of Charles Remsen was accepted, and Thomas J. Regan was elected in his place.

The resignation of John H. Waydell was accepted, and Daniel H. Shea was elected in his place.

The resignation of G. Howland Leavitt was accepted, and William K. Ryan was elected in his place.

The resignation of Alexander Hadden was accepted, and John B. Johnson was elected in his place. 584

The resignation of Edward Lauterbach was accepted, and Henry A. Himely was elected in his place.

Henry Hart having failed to qualify as a director, his place was declared vacant and James A. Traynor was elected to the vacancy.

Henry Iden, having failed to qualify as a director, Thomas Robins, Jr., was elected a director in his place.

John E. Parsons, having resigned on February 23, 1900, Frank S. Robins was elected to fill the vacancy. 585

The resignation of Albert J. Elias was accepted, and J. Sanford Barnes was elected to fill the vacancy.

The resignation of David C. Andrews was accepted, and Pierre Jay was elected to fill the vacancy.

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the

586 following extract from the minutes of the Annual Meeting of the Stockholders of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 17, 1901:

"*Fourth,* That John Beaver, John Byrns, Reune Martin, Frank S. Rollins, Henry A. Himely, William K. Ryan, Frank P. Jackson, Thomas Robins, Jr., J. Sanford Barnes, Thomas Reagan, Daniel H. Shea, John B. Johnson and Pierre Jay, each having received a majority of all votes cast, were duly elected and are hereby declared to be
587 duly elected directors of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company for the ensuing year."

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of a meeting of the Board of Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held February 28, 1901, whereat John Beaver was
588 elected President, Thomas A. Maher was elected Secretary and Treasurer, and R. L. Anderton, Jr., was appointed Stock Transfer Clerk.

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of the Annual Meeting of the Stockholders of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 16, 1902:

"We do further certify that the following named persons having received a majority of the votes cast, were duly elected directors of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company for the ensuing year: 589

Messrs. John Beaver	John Byrnes
Reuen Martin	Frank S. Rollins
Henry A. Himely	W. K. Ryan
Frank B. Jackson	Thomas Robins, Jr.
J. Sanford Barnes	Thomas Regan
D. A. Shea	John B. Johnson

Pierre Jay."

590

Mr. Whittlesey: The same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey:

Mr. Bickford: I also offer in evidence the following extract from the minutes of a meeting of the Board of Directors of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 23, 1902, whereby it appears that John Beaver was elected President, Charles E. Warren, Secretary and Treasurer, Oren Root, Jr., Superintendent of the Company with the title of General Manager, R. McKean Barry, Secretary and Treasurer, and D. C. Moorehead, as General Auditor of the Company. 591

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey:

Mr. Bickford: I also offer in evidence the following extract from the minutes of the Annual Meeting of the Stockholders of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 15, 1903:

592 "We, the undersigned, Inspectors of Election for Thirteen Directors of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, and for three Inspectors of Election for the ensuing year, do hereby certify that said election was held pursuant to notice at the office of the company, No. 177 Manhattan Street, between the hours of twelve noon and one P. M. on this 15th day of January, 1903, and we do further certify that the following named persons received the number of votes set opposite their respective names:

593

John Beaver	24201
John Byrns	"
Reuen Martin	"
Frank S. Rollins	"
Henry A. Himely	"
W. K. Ryan	"
Frank B. Jackson	"
Thomas Robins, Jr.	"
J. Sanford Barnes	"
Thomas J. Reagan	"
D. H. Shea	"
John B. Johnson	"
Pierre Jay	"

594 We do further certify that for Inspectors of Election, the following named persons received the number of votes set opposite their respective names:

M. L. Banker	24201
Edward Ostrander	"
E. Wolf	" "

Mr. Whittlesey: I make the same objection.
The Master: The same ruling.
Exception by Mr. Whittlesey:
Mr. Bickford: I also offer in evidence the

following extract from the minutes of a meeting of the Board of Directors of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 22, 1903, whereby it appears that John Beaver was elected President, Charles E. Warren was elected Secretary and Treasurer, and Oren Root, Jr., was elected Superintendent of the Company with the title of General Manager. 595

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey:

Mr. Bickford: I also offer in evidence the following extract from the minutes of the Annual Meeting of the Stockholders of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 21, 1904, whereby it appears that the following persons were elected directors of the Company: 596

"We, the undersigned, Inspectors of Election for Thirteen Directors of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, and for three Inspectors of Election for the ensuing year, do hereby certify that the said election was held pursuant to notice at the office of the Company, No. 177 Manhattan Street, between the hours of twelve noon and one P. M., on this twenty-first day of January, 1904, and we do further certify that the following named persons received the number of votes set opposite their respective names: 597

598

J. Sanford Barnes, Jr.	24201
John Beaver	"
John Byrns	"
Edward J. Hatch	"
Henry A. Himely	"
Frank B. Jackson	"
John B. Johnson	"
Reuen Martin	"
Frank F. Ogston	"
Thomas J. Reagan	"
Frank S. Rollins	"
D. H. Shea	"
George Yardley	"

599 We do further certify that for Inspectors of Election, the following named persons received the number of votes set opposite their respective names:

M. L. Banker	24201
Edward Ostrander	"
E. Wolf	" "

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of a meeting of the Board of Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held March 17, 1904, whereby it appears that Henry A. Himely resigned and Edwin Wolf was elected a director in his place.

600

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of the Annual Meeting of the Stockholders of the Forty-second Street Manhattanville and St.

Nicholas Avenue Railroad Company, held January 19, 1905. 601

"We do further certify that the following named persons having received a majority of the votes cast, were duly elected directors of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company for the ensuing year:

J. Sanford Barnes, Jr.	John B. Johnson
John Beaver	Reuen Martin
John Byrns	Frank F. Ogston
Edward J. Hatch	Thomas J. Reagan
Frank B. Jackson	Frank S. Rollins
Daniel H. Shea	Edwin Wolf

602

George Yardley."

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of the Board of Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 26, 1905, whereby it appears that John Beaver was elected President, Charles E. Warren was elected Secretary and Treasurer, Reuen Martin was elected Assistant Secretary, and Edwin Wolf was appointed Superintendent of the Company. 603

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of the Stockholders of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 18, 1906, where-

604 by it appears that the following persons were elected directors of the Company for the ensuing year:

J. Sanford Barnes, Jr.	John B. Johnson
John Beaver	Reuen Martin
John Byrns	Frank F. Ogston
Edward J. Hatch	Thomas J. Reagan
George W. Linch	Edwin Wolf
Daniel H. Shea	George Yardley

W. A. Anderson.

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

605 Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of the Board of Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 26, 1906, whereby it appears that John Beaver was elected President, Charles E. Warren was elected Secretary and Treasurer, and Reuen Martin was elected Assistant Secretary and Assistant Treasurer, and Edwin Wolf was appointed Superintendent.

Mr. Whittlesey: I make the same objection.

606 The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of a Special Meeting of the Board of Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held May 10, 1906, whereat the resignation of J. Sanford Barnes as a director was accepted, and A. V. Porter was elected to fill the vacancy.

The resignation of George Yardley as a

director was accepted and Frank S. Gannon 607
was elected to fill the vacancy.

The resignation of Edward J. Hatch was accepted and Oren Root, Jr., was appointed General Manager of the Company.

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of the Annual Meeting of the Stockholders of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held January 17, 1907, whereby it appears that 608
the following persons were elected directors of the company:

"We do further certify that the following named persons having received a majority of the votes cast, were duly elected directors of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company for the ensuing year.

John Beaver	Frank F. Ogston
John Byrns	A. V. Porter
James I. Burke	Thomas J. Reagan
John B. Johnson	Daniel H. Shea
George W. Linch	Edwin Wolf 609
Reuen Martin	Frank S. Gannon

W. A. Anderson."

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Bickford: I also offer in evidence the following extract from the minutes of a meeting of the Board of Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, held February 28, 1907, whereby it appears that John

610 Beaver was elected President, Charles E. Warren was elected Secretary and Treasurer, Reuen Martin was elected Assistant Secretary and Assistant Treasurer, and Oren Root, Jr., was elected General Manager.

Mr. Whittlesey: I make the same objection.

The Master: The same ruling.

Exception by Mr. Whittlesey.

Mr. Holbrook: The testimony to-day is received on behalf of the Receiver of The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company as well. I suppose it does come in.

611 Mr. Borland: All the evidence that is offered to-day is offered on behalf of the Central Trust Company also.

The Master: All the evidence offered in defence of the claim is offered on behalf of all persons disputing the claim.

Adjourned to Tuesday, November 9, 1909, at 11 A. M.

New York, November 9, 1909.

612 Met pursuant to adjournment.

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, Receiver of the New York City Railway Company. (GEORGE N. WHITTLESEY, of Counsel.)

BOWERS & SANDS, Solicitors for the Central Trust Company. (MIDDLETON S. BORLAND, of Counsel.)

MERRILL & ROGERS, Solicitors for F. W.

Whitridge, Receiver of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company. (ALFRED H. HOLBROOK, of Counsel.) 613

EVARTS, CHOATE & SHERMAN, Solicitors for F. W. Whitridge, Receiver of the Third Avenue Railroad Company. (HERBERT J. BICKFORD, of Counsel.)

Mr. Whittlesey: If the Master please, I had expected to have Mr. Brown here to-day to testify as to the amount of interest and the character of interest which entered into the account which we are now engaged in proving, and as late as yesterday noon Mr. Brown told me he would be ready. About three-quarters of an hour before the hearing this morning he told me he had not been able to complete his analysis of interest and could not come and testify, as he did not have the facts. I could have subpœnaed him, but he would not have been able to testify. He assures me he will be able to at the next hearing. He tells me on Friday or Saturday morning he could be ready. 614

The Master: You want to get enough in the record to raise the question as to who was entitled to this interest, regardless of whether it is an operating debt or not. 615

Mr. Bickford: Isn't there enough in there already for that?

The Master: I do not know. You have got the mortgage in the record.

Mr. Whittlesey: The mortgage and the lease are in the record.

Adjourned by consent to Saturday, November 13, 1909, at 10 A. M.

616 New York, November 13, 1909.

Met pursuant to adjournment.

APPEARANCES:

DEXTER, OSBORN & FLEMING, Solicitors for William W. Ladd, Receiver of the New York City Railway Company. (GEORGE N. WHITTLESEY, of Counsel.)

BOWERS & SANDS, Solicitors for the Central Trust Company. (DAVID G. GEORGE, of Counsel.)

617 MERRILL & ROGERS, Solicitors for F. W. Whitridge, Receiver of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company. (ALFRED H. HOLBROOK, of Counsel.)

EVARTS, CHOATE & SHERMAN, Solicitors for F. W. Whitridge, Receiver of the Third Avenue Railroad Company. (HERBERT J. BICKFORD, of Counsel.)

HARDIE B. WALMSLEY, recalled as a witness on behalf of the Receiver of The Third Avenue Railroad Company.

618

Direct-examination by Mr. Bickford:

Q. Mr. Walmsley, were there any certificates or stock of the Forty-second Street Company outstanding on April 30, 1907, which do not appear in the certificate book which you produced at the last hearing? A. There were, yes.

Q. Will you state what they were?

Mr. Whittlesey: Might he state what the basis of his information is as to the certificates?

A. I made an examination of the stock ledger 619
when I found that the number of shares shown on the list which I made up from the certificate book in the possession of the Central Trust Company did not tally with the number of shares of the company known to be outstanding, and from that examination of the stock ledger I found that the following certificates were outstanding on April 30, 1907, which do not appear in my previous testimony:

John Byrns, 1 share, certificate No. 1783, issued November 18, 1897, canceled January 22, 1908.

Harriet Weed Hollister, 1 share, certificate No. 620
1025, issued December 9, 1889, uncanceled.

Elizabeth Granger Hollister, 1 share, certificate No. 1026, issued December 9, 1889, uncanceled.

Elizabeth S. Lydecker, 10 shares, certificate No. 1667, issued November 20, 1895, uncanceled.

M. L. Rutherford, 10 shares. From the stock ledger it does not appear what the certificate number is, but it is stated that it is his balance on January 26, 1886, and after that there were no entries.

Henry C. Rosenbaum, 55 shares, certificate No. 685, for 30 shares, issued June 10, 1887, uncanceled. 621

Certificate No. 1540, for 15 shares, issued September 18, 1893, uncanceled.

Certificate No. 1691, 10 shares, issued December 5, 1895, uncanceled.

Albert J. Seligsberg, 9 shares, certificate No. 1690, issued December 5, 1895, uncanceled.

Q. The stock ledger to which you refer was the ledger which was produced at the last hearing and marked for identification? A. It was, yes, sir; it was marked for identification.

Q. Does that ledger show the total number of

622 shares of the Forty-second Street Company outstanding on April 30, 1907? A. In the stock ledger there was a sheet, which, by comparison with the accounts, appears to be a balance sheet of the stock ledger as of January 4, 1908, and from that sheet it appears that there were 51 shares unissued, which would make a total of 24,949 issued.

Cross-examination by Mr. Whittlesey:

Q. Did you verify the facts shown on this sheet, to which you have just referred, by your examination of the stock ledger and certificate book? A. I did, yes.

623

Mr. Whittlesey: I would call attention to the fact that the mortgage recites that the total issued capital stock of the Forty-second Street, Manhattanville and St. Nicholas Railroad Company is $2,500,000, of which the Third Avenue Railroad Company at that time is recited by the mortgage to have held $1,671,100 of par value.

---

624 Henry W. Brown resumed the stand.

Direct-examination Continued by Mr. Whittlesey:

Q. Mr. Brown, on page 69, in answer to the question as to whether income account was a broader phrase than an operating account, you answered "In my opinion, no." I call your attention to the rest of the answer at that point and ask you if there is any qualification or explanation or other answer that you would give to that question? A. The only way I would change the answer would be to re-arrange it so as to make it a little clearer,

make the answer read: "In my opinion, no. Of course it depends upon the use of the word operations. If you are going to construe operations to mean operating expenses, then income is a broader term than operating, as the operating expenses are a subdivision of the income account. As a general rule the term operations is used to express the same meaning as the word income." 625

Q. Your attention was directed chiefly in this connection at the last hearing to the use of the phrase operating expenses. In your opinion, is there any distinction between operating expenses in the sense which you defined in your answers at that hearing, from operating debt? A. Well, there is no comparison between operating expenses and operating debt, because an operating expense is the cost of conducting the business for the production of revenue, and an operating debt or a debt is an unpaid obligation. An operating debt would entirely depend upon the intent as to what might be meant by such a phrase. 626

Q. In your opinion is interest on construction balances and interest on notes given for construction, an operating debt? A. Treating it in the broad sense, I would consider it as an operating debt. Operating debt is not a technical phrase. In some cases in my opinion it might be construed as one thing, and in other cases as another. It would depend in my opinion in the manner in which it was used as to what it would mean. 627

Q. So you would say there is no well defined meaning of the phrase operating debt from the point of view of an accountant?

The Master: Those words standing by themselves would not contain a definite meaning.

628 A. To me those words would not contain any definite meaning.

Q. Mr. Brown, have you made an examination so that you can testify as to the aggregate amount of interest which was charged against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company in the account in question, of which a transcript has been marked here for identification? A. I have had one of my assistants check a statement that has been prepared in that connection. Personally I have not made an examination of the records to personally verify it.

629 Q. Did your assistant tell you that he had verified it? A. My assistant has verified it, and I would be willing personally to consider that verification as complete as though I had done it myself.

Q. Will you state what the aggregate amount of interest which is charged in this account against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company on the books is? A. The aggregate amount of interest which was charged in the account showing a balance on April 30, 1907, equal to the amount of the note

630 given to the New York City Railway Company, was $1,277,620.23.

The Master: You mean to say, do you, in this general account, the balance of which on April 30, 1907, was the amount of the note, for which balance the note was given to the New York City Railway Company, there was charged against the Forty-second Street Company interest to the amount of $1,277,620.23?

The Witness: That is correct.

Q. How much of that aggregate was interest charged on notes made by the defendant and given for construction purposes? 631

The Master: Notes given by the Forty-second Street Railroad Company for construction purposes.

A. I do not think that question is clear. If you will just ask it again.

The Master: Are you able from the record before you to divide this total that you have just given into parts and itemize it in general terms? 632

The Witness: I am able to state the amount of interest, as shown by the records, that was charged on amounts which show it was advanced for construction purposes.

The Master: What is that amount?

The Witness: The amount of interest on advances shown by the records for construction purposes, is $1,230,690.40.

Q. And how much of the total aggregate of $1,277,620.23 appears from the records to have been charged on balance for advances on operating account? 633 A. For advances on operating account, $24,013.24.

Q. What other interest appears in the total aggregate? A. Interest on a real estate mortgage of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, or, rather, real estate mortgages, amounting to $22,916.59.

Q. Can you state as to the advances for construction purposes what part of the total for con-

634 struction purposes was represented by notes given by the defendant? A. The amount of interest on the notes aggregated $980,254.92.

Q. And the balance of the interest for construction purposes was interest on open account showing construction advances, was it? A. That is correct.

By the Master:

Q. Do you know how much of the total amount of interest charged was charged on the $6,000,000 note of 1901? A. It would take some little time
635 to figure it out.

Q. Was this $6,000,000 note, given on July 1, 1901, one of the notes which you refer to in your answer? A. I am not familiar at the present time with the note of $6,000,000 to which you refer. That is a matter that has gone from my recollection.

Q. Do you know what the so-called construction notes were upon which interest was charged in this account? A. I do not know the details, no.

By Mr. Whittlesey:

636 Q. You were familiar with the particulars of those notes, were you not, from the time of your connection with the company, on or about July 1, 1904? A. I was entirely familiar with them during the time of my connection of the period involved.

Q. All you mean now by saying you do not recall, is you do not at present recall the details and amounts of the notes? A. That is correct.

Q. I call your attention to the transcript from the minute book of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, which is in evidence here, to the min-

utes of the special meeting of the Board of Directors of June 27, 1907, to which is attached a plan for settlement of construction liabilities of the defendant as of April 30th, and ask you if from that, by referring to that, you can state if one of the notes given for construction purposes to which you have referred was a demand note made by the defendant in favor of the Third Avenue Railroad Company, dated July 1, 1901, for the principal sum of $6,055,468.98? A. If this is a true copy of the statement that was made at that time, it is, of course, correct as to the facts stated. 637

By the Master: 638

Q. And it appears from that that the note in question was one of those? A. It appears from that that there was such a note as that, dated July 1, 1901, in favor of the Third Avenue Railroad Company.

Q. Don't you recollect that there was such a note? A. I recollect there was a note for a large amount, but it is absolutely impossible for me to carry all the details and figures in my head.

By Mr. Whittlesey: 639

Q. To the best of your recollection, Mr. Brown, were the notes given for construction purposes, to which you have referred, and upon which interest was charged, as appears by the records, as you have testified, the notes mentioned in the plan for settlement of construction liabilities as of April 30, 1907, which was presented to the Board of Directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company at the special meeting of that board held on June 27, 1907? A. They were.

It is admitted by all parties that the notes

640 referred to appear on the minutes of November 6, 1908, in this proceeding, marked Claimant's Exhibit D of that date.

Q. In the case of any of these notes which antedate the time when the lease of the New York City Railway Company went into effect, is it the fact that the interest on such notes which was charged and which enters into the aggregate which you have mentioned, was charged only from the date from which the New York City Railway Company lease went into effect? A. According to the records, the interest accrued subsequent to the date
641 of the lease of the Metropolitan Street Railway Company's property to the New York City Railway Company.

Q. You testified at a former hearing with regard to a charge for interest for the month of April, 1907, that in computing that interest all prior interest which had entered into the account had first been deducted, so that compounding of interest was avoided. Is it a fact that similar deductions for prior interest were made in computing and charging all the interest of which the aggregate, as you have testified, amounted to
642 $1,277,620.23? A. I cannot testify as to that fact for the period prior to July 1, 1904. Since July 1, 1904, that is a fact.

Q. Did you ever cause an examination of the books for the period after the date of the lease to the New York City Railway Company, and prior to July 1, 1904, to be made, which gave you any information as to the deductions so as to avoid the compounding of interest during that period? A. Never, to my recollection; it may have been done four or five years ago; whether it was or not I do not remember. My recollection is it did not.

Q. The settlement of accounts of the defendant company which was made as of April 30, 1907, was made under your supervision, was it not? A. It was. 643

The Master: Was the statement that was presented to the meeting prepared?

The Witness: It was.

The Master: Under your direct supervision?

The Witness: It was.

Q. And that was done after an examination of the books of account and vouchers of the New York City Railway Company and the defendant railway company made by you, or under your direction, was it? A. That settlement was made on the basis of the accounts as they appeared by the books of various companies on April 30, 1907. 644

Q. To the best of your knowledge and information, was the balance of account in favor of the New York City Railway Company and against the defendant company on April 30, 1907, the amount for which the note to the New York City Railway Company of that date was given? A. It was. 645

By the Master:

Q. What did you call this account, the payment of the balance for which on April 30th this note was given? A. Called it the indebtedness of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company to the New York City Railway Company.

Q. General account? A. Why, we never considered it necessary other than to call it an account between the two companies.

646 Q. Is there any other account of the obligations of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company to the New York City Railway Company? A. There was no other account due the New York City Railway Company.

By Mr. Whittlesey:

Q. Mr. Brown, you have testified that Mr. Armstrong, the electrical engineer, reported to you the amounts of electrical power furnished to the Forty-second Street, Manhattanville and St. Nicholas
647 Avenue Railroad Company each month. Were the amounts charged against the defendant company for such power computed upon the basis of those reports in your office? A. They were, but I might say my testimony was I received the reports from the electrical engineer. Mr. Armstrong was electrical engineer during the latter part of the period, but not during the first part of the period.

Q. But you did receive them from the electrical engineer for the time being? A. I received it during the entire period. My recollection is it came from the electrical engineer or a man occupying a similar position.

648 Q. Were they monthly reports? A. They were monthly reports, yes.

Q. And the charges against the defendant for such power were computed from those reports? A. That is correct.

Q. And those are the charges which appear as monthly charges against the defendant in the account of which a transcript has been marked for identification; is that correct? A. That is true since July 1, 1904.

Q. Mr. Brown, was the open account for which a claim was filed by the Receivers of the New York

City Railway Company, and which claim constitutes a part of the claim before the Master, being numbered Claim No. 172, a continuation of the account of which a transcript has been offered for identification, and which was settled by the note of April 30th, given to the New York City Railway Company? A. That is correct. 649

By the Master:

Q. It was? A. It was a continuation.

Q. Referred to as a claim on open account? A. Yes, sir.

Q. Then this note was given to settle the open account as it existed on April 30, 1907? A. That is correct. 650

Mr. Whittlesey: I would like to offer the transcript which was marked for identification in evidence.

Mr. Bickford: I object to its being received in evidence, not, however, because it is a transcript, but because the books themselves are not evidence of the claim which is made.

The Master: I will admit the transcript and take your objection, and you can raise your questions with respect to the sufficiency of the proof on a motion after the transcript is part of the record, so the whole case will be before the Court. 651

Exception by Mr. Bickford.

Mr. George: I join in the objection, and note an exception.

Marked respectively Claimant's Exhibits D to J, November 13, 1909.

By Mr. Whittlesey:

Q. From what information was the price for

652 power which was charged the defendant company fixed?

Mr. Bickford: I object to that unless the witness knows of his own personal knowledge.

Mr. George: I join in that objection.

A. What is the question again?

Q. I am talking about the rate.

By the Master:

Q. Fixed by whom? A. Fixed by the contract between the companies.

653 Q. Were there any charges made against the Forty-second Street Railroad Company or any account in which charges were made against the Forty-second Street Railroad Company except for construction, that are not included in this account we are now dealing with, so-called open account or general account? A. There were no charges made by the New York City Railway Company against the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Q. Then this account represents all charges made against the Forty-second Street Railroad Company, except charges for construction pur-

654 poses, amounts advanced for construction purposes, as to which a separate account was kept? A. That is correct.

By Mr. Bickford:

Q. Did the New York City Railway Company have a construction account with the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. It did not directly, no.

By the Master: 655

Q. Did it have any other account with the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company except this one? A. It had no other account with the Forty-second Street Company except this account.

Q. Do any charges for construction purposes appear in this account? A. Not directly, no.

Cross-examination by Mr. Bickford:

Q. Will you look at this copy of the statement which was presented to the directors of the Forty-second Street Company on June 27, 1907, and state 656
whether the amount appearing under the heading "New York City Railway Company, amount expended by this company from its earnings by withholding an equal amount from the amount due the N. Y. City Ry. Co. for power, labor and material furnished by that company, $42,006.78," whether those items, amounting to $42,006.78, were included in this same account concerning which you have been testifying? A. They were originally included in that account, and afterwards credited.

Q. Those were construction items? A. They 657
were indirectly construction items.

Q. They were of such a character that it was deemed proper in adjusting the accounts to classify them as construction obligations? A. No. The explanation of that is, it seems to me, perfectly clear. The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company had expended its own money, its income, for construction purposes, by withholding an equal amount from the amount it owed the New York City Railway Company, which indirectly would make it equivalent to an advance by the New York City Railway

658 Company for construction purposes; whereas, the items might have been power furnished. They withheld the money instead of paying for the power; they withheld that money and used it for construction purposes.

Q. So expenditures for the construction items themselves did not appear on this account, but appeared in some other account? A. They appeared in the accounts of the Forty-second Street, Company.

The Master: In order that there may be no misunderstanding on the record, it should ap-
659 pear that this amount, as to which Mr. Bickford has just been questioning the witness, is included in the note amounting to about six and a half million dollars, held by the Central Trust Company, and the claim being numbered 70 before me.

By Mr. Bickford:

Q. Mr. Brown, all of the obligations, whether they consisted of notes or balances due on open account, upon which you have testified interest to the amount of $1,230,690.40 was charged in this
660 account, were merged as of April 30, 1907, into the note to the Morton Trust Company, as Trustee, for $6,491,967.44, were they not? A. That is correct, yes.

Q. All of that interest was charged prior to April 30, 1907, was it not? A. That is correct.

Q. What were the real estate mortgages upon which $22,916.59 and interest was charged? A. Just what properties they cover, I do not remember, but my recollection is there were three mortgages, one for $50,000, and two for $25,000, which were acquired with the proceeds of the First Consolidated Mortgage Bonds of The Third Avenue

Railroad Company; that is, they were acquired out of the $35,000,000 of bonds which were issued when the bonds were first authorized. 661

Q. Were those mortgages obligations of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. That is my understanding.

Q. At any rate, they were liens upon real property which the Forty-second Street Company owned? A. That is my understanding, yes.

Q. Mr. Brown, prior to June 30, 1909, by what system were the accounts of street railway companies in this city required to be kept? 662

Mr. Whittlesey: I object to that unless he states required by whom.

Q. Required by the Railroad Commission of the State of New York, or by the Public Service Commission.

Mr. Whittlesey: I object to the question.

Mr. Bickford: I will withdraw the question.

Q. Mr. Brown, prior to June 30, 1909, by what system were the records and accounts of street railway companies in this city kept? A. Kept by the double entry system. 663

Q. Were they kept by what was known as the Railway Commission's system? A. A certain portion of them was kept in accordance with the classification of accounts which was prescribed by the State Board of Railroad Commissioners.

Q. Known as a standard system of street railway accounting? A. I am not sure whether the term was as broad as that; it only coveed the classification of the operation charges, &c. There are a great many accounts kept on your books, such

664 as your accounts payable, &c., and accrued accounts, of that nature, the classification of which were not prescribed by the State Board of Railroad Commissioners any more than they had a form in their report for showing such items.

Q. Will you look at the statement which I now show you and state whether you know what it is (handing pamphlet to witness)? A. I do.

Q. What is it? A. It is a blank on which the report of the companies were required—that is, the railroad companies were required to report to the State Board of Railroad Commissioners for the year ending June 30, 1907.

665 Q. And had substantially that form been used for some years prior thereto? A. It had.

Q. Can you tell when that originated? A. I think it was 1902; I do not remember the date of it.

Q. It had been used for several years? A. It had been used for several years.

Q. Will you turn to the the table of operating expenses in this form of report and state whether under the designation of Operation Expenses, you find any requirement as to the inclusion of interest?

666 Mr. Whittlesey: I object to the question.

The Master: Perhaps he has not laid a foundation for it.

Mr. Whittlesey: That is what I mean.

The Master: We do not know whether this provision goes into detail and states what an operating expense account must contain.

Mr. Whittlesey: Furthermore, the fact that the Board of Railroad Commissioners required something involves a question of what authority they have to require it.

Mr. Bickford: That is a matter of law.

The Master: Simply as bearing upon the purpose of the parties. 667

Mr. Whittlesey: Is that your purpose in offering it, as showing the purpose of the State Board of Railroad Commissioners?

Mr. Bickford: Yes.

Mr. Whittlesey: And not showing their classification was binding upon the claimant here?

The Master: Leave that open as a subject of argument.

Mr. Bickford: You have put in evidence the opinion of this witness as to what an operating expense and operating debt is. I think that it is proper cross-examination. 668

The Master: I will let it in. I think the record better show whether it went into detail.

Q. That report required a statement in detail classified under various headings of operating expenses, of what should be regarded as operating expense? A. That is correct.

Q. Will you look at Table D in that form of report and state whether that requires reports in detail as to operating expense accounts? A. It requires the showing of total charges during the year to the account specified. 669

Q. Now, that has first "Maintenance." That is subdivided into "Way and Structures." There are three subdivisions under that heading. Is there any interest to be included there? A. None.

Mr. Bickford: I will offer that table in evidence.

Mr. Whittlesey: I do not object to its being offered for the purpose of showing what that classification of the statements of the Board of Railroad Commissioners for that year was,

670 but I do object to it as having no binding effect upon the claimant here.

The Master: The objection is overruled.

Exception by Mr. Whittlesey.

Marked Receiver Third Avenue Railroad Company Exhibit 4, November 13, 1909, and the following is a copy thereof:

Read Foot Notes Carefully.

TABLE D.

ANALYSIS OF GROSS EARNINGS AND OPERATING EXPENSES.

Earnings.	Amount.	
671 *From Passengers:*		
Cash Fares	$.....	.....
Ticket Fares	.....	.....
Chartered Cars	.....	.....
		$.....
From Other Sources:		
Freight	$.....	.....
Express	.....	.....
Mail	.....	.....
†.....	.....	.....
†.....	.....	.....
‡Total Gross Earnings as shown on page 7		$.....

*This column is for totals only.

†Include any other receipts resulting from direct operation of the road.

672 ‡To agree with corresponding Item in Income Account, Table C, "Gross Earnings from Operation."

673

Operating Expense Accounts.			
MAINTENANCE.			
Way and Structures:			
1. Maintenance of Track and Roadway	$.....	.....	.....
2. Maintenance of Electric Line	.....	.....	.....
3. Maintenance of Buildings and Fixtures	.....	.....	.....
	———	$.....	.....
Equipment:			
4. Maintenance of Steam Plant	$.....	.....	.....
5. Maintenance of Electric Plant	.....	.....	.....
6. Maintenance of Cars	.....	.....	.....
7. Maintenance of Electric Equipment of Cars	.....	.....	.....
8. Maintenance of Miscellaneous Equipment	.....	.....	.....
9. Miscellaneous Shop Expenses	.....	.....	.....
	———	———	$.....
TRANSPORTATION.			
Operation of Power Plant:			
10. Power Plant Wages	$.....	.....	.....
11. Fuel for Power	.....	.....	.....
12. Water for Power	.....	.....	.....
13. Lubricants and Waste for Power Plant	.....	.....	.....
14. Miscellaneous Supplies and Expenses of Power Plant	.....	.....	.....
15. Hired Power	———	$.....	.....
Operation of Cars:			
16. Superintendence of Transportation	$.....	.....	.....
17. Wages of Conductors	.....	.....	.....
18. Wages of Motor Men	.....	.....	.....
19. Wages of Miscellaneous Car Service Employees	.....	.....	.....
20. Wages of Car House Employees	.....	.....	.....
21. Car Service Supplies	.....	.....	.....
22. Miscellaneous Car Service Expenses	.....	.....	.....
22a. Hired Equipment	.....	.....	.....
23. Cleaning and Sanding Track	.....	.....	.....
24. Removal of Snow and Ice	.....	.....	.....
Amount carried forward			$.....

674

675

676 Read Foot Notes Carefully.

TABLE D—Concluded.

OPERATING EXPENSES—Concluded.*

Amount brought forward...			$.....
GENERAL.			
25. Salaries of General Officers	$.....	.....	.....
26. Salaries of Clerks.....	.....	.....	.....
27. Printing and Stationery....	.....	.....	.....
28. Miscellaneous Office Expenses	.....	.....	.....
29. Stores Expenses	.....	.....	.....
677 30. Stable Expenses	.....	.....	.....
31. Advertising and Attractions	.....	.....	.....
32. Miscellaneous General Expenses	.....	.....	.....
33. Damages	.....	.....	.....
34. Legal Expenses in Connection with Damages.....	.....	.....	.....
35. Miscellaneous Legal Expenses	.....	.....	.....
36. Rent of Land and Buildings	.....	.....	.....
37. Rent of Tracks and Terminals	.....	.....	.....
38. Insurance	.....	.....	.....
†Total Operating Expenses as Shown on page 7.....			$.....

678

‡Operating Cost	% of Earnings (excluding Taxes).
‡Operating Cost	% of Earnings (including Taxes on all property actually used in operation of road and on Earnings and Capital Stock).
‡Operating Cost	cents per car mile (excluding Taxes).

Operating Expenses, per mile.....	.....
Net Earnings, per mile.....	.....
Number of Passengers carried per mile.....	.....
Gross Earnings per mile.....	$.....

*This column is for totals only.
†To agree with corresponding item in Income Account (Table C), page 7.
‡These items MUST be furnished. Carry to decimals of two or more figures.

Q. In that form of report are the operation expense accounts one of the subdivisions of the income accounts? A. They are. 679

Q. Under that account was a separate report required as to the amount of interest on floating debt; 2, interest on railroad mortgages; 3, interest on floating debt as another sub-division of the income account? A. They did not require a separate report.

Q. A separate statement? A. It requires us to show what is known as Table C, the amount of the interest charges during the year for the various classes of interest accruing during the year.

Q. And the interest was reported separately from operating expenses? A. The interest was reported separately from operating expenses. 680

By the Master:

Q. Was it a report independent of the report required for operating expenses by them? A. Just the same as the various accounts within the operating expenses were required to be shown separately.

Q. Separately in the same report, in the same schedule? A. Yes.

Q. But this was a separate schedule, the report of the interest? A. Merely for convenience. 681

Q. But was it a fact? A. In my opinion it is not a fact.

Q. I say was it required to be kept as a separate schedule, as a fact? I am not talking about whether it was not the same thing? A. If you are talking about the particular printed pages upon which the information was to be shown, it was to be shown on different pages.

Q. On different schedules? A. They were all part of the same thing.

682 Q. I mean different tables; all part of the general report or part of the same subdivision? A. All part of the same subdivision of the report.

Q. Does the subdivision of the report that is entitled "Operating Expenses" provide for return as to interest? A. That particular page does not, no.

Q. Does any part of that subdivision which is labelled separately as Table D provide for any return as to interest? A. No, it does not.

Q. But such a return is provided for in another table? A. Yes, sir.

683 Q. And part of the same general report? A. Of Table C.

By Mr. Bickford:

Q. In Table C the companies were required to give first net earnings from operation. Now, how was that item made up? A. They were required to give first in Table C the gross earnings from operation as shown by Table D.

Q. There was no interest in that item? A. There was no interest, no.

Q. What is the next item? A. The next item is they were to show the operating expenses as per

684 Table D.

Q. There was no interest in that item? A. There was no interest in that item.

Q. And then they were to make the deduction and show the net earnings from operation? A. That is correct, yes, sir.

Q. Then they were required to give income from other sources, as follows? A. That is correct.

Q. That did include interest? A. It did.

Q. Then they were required to show the total of gross income from all sources? A. That is correct.

Q. Which was merely an addition of the preceding items? A. That is correct. 685

Q. Then they were required to show deductions from income as follows: Interest on funded debt, interest on real estate mortgages, interest on floating debt? A. That is correct.

Q. And certain other items, and then you strike a balance, which was called "Net income from all sources"? A. That is correct.

Mr. Bickford: I offer Table C in evidence.

Mr. Whittlesey: I make the same objection.

Objection overruled. Exception by Mr. Whittlesey. 686

Marked Receiver Third Avenue Railroad Company, Exhibit 5, November 13, 1909, and the following is a copy thereof:

Read Foot Notes Carefully.

TABLE C.

INCOME ACCOUNT FOR YEAR ENDING JUNE 30, 1907.

Gross Earnings from Operation as per Table D Less Operating Expenses (excluding all taxes) as per Table D.....		$.....
NET EARNINGS FROM OPERATION.....		$..... 687
Income from Other Sources as Follows, viz.:		
Advertising	.....	.....
Sale of electric current.....	.....	.....
Rent of land and buildings.....	.....	.....
Rent of tracks and terminals.....	.....	.....
Interest and dividends on securities owned	.....	.....
Interest on deposits.....	.....	.....
Net income from operating of illuminating or power plant.....	.....	.....
GROSS INCOME FROM ALL SOURCES.....	.....	$.....

688 *Deductions from Income as Follows, viz.:*

Interest on funded debt	$.....	.....	
Interest on real estate mortgages	.....	.....	
Interest on floating debt	.....	.....	
*Rentals of leased lines.			
Taxes: On property used in operation of Road	.....	.....	.....
Taxes: On Earnings and Capital Stock	.....	.....	.....
Taxes: On property not used in railroad business	.....	.....	.....
NET INCOME FROM ALL SOURCES		.....	$.....

Payments from Net Income as Follows, viz.:

689 Dividends declared % on $ Common Stock		.....	.....
Dividends declared % on $ Preferred Stock		.....	.....
†			
†			
‡Surplus or Deficit for the Year Ending June 30, 1907		.....	$.....
GENERAL INCOME ACCOUNT		.....	.....
‡Surplus or Deficit up to June 30, 1906		.....	.....
‡Total Surplus or Deficit June 30, 1907			$.....

*Give full details on page 8. This is to include rental paid for other railroad or railroads leased or operated only. Other rents (such as rents of buildings, tracks, terminals, etc.) are charged to operating expenses, pages 9 and 10.

690

†Any payments relating to this year's business exclusively, not pertaining to operation.

‡If Surplus is shown strike out the words "Or Deficit." If Deficit is shown strike out the words "Surplus or."

§State taxes on account of Railroad Commissioners should be included in "Taxes on earnings and capital stock." Only taxes on property not used in railroad business should be carried here.

DETAILED STATEMENT OF RENTALS. 691

Name of Lessor.	Total Amount of Rental Paid by Lessee.	Portion Used for Payment of Interest on Funded Debt of Lessor.	Portion Used for Payment of Dividends on Capital Stock of Lessor.	*Portion not Inlcuded in Foregoing Payment of Interest or Dividends.

Total amount of Rentals Deducted from Income on page 7..... 692

*Taxes on leased lines should be included in "taxes" on page 7 and not included here.

Q. Mr. Brown, in which one of these classifications would you place such obligations as you computed the interest upon, with what are known as construction obligations, funded debt, interest on real estate mortgages, or interest on floating debt? A. The interest for construction purposes would appear under interest on funded debt and interest on floating debt. 693

Q. Would any of these obligations, these particular obligations, upon which you computed interest, be computed as funded debt? A. They would not.

Q. They would all be computed as floating debt? A. Yes, sir.

Q. And the principal of the funded debt was not required to be stated in this particular account, Table C? A. It was not.

Q. Simply interest? A. That is correct.

Q. Was there in force during the same period

694 substantially the same system of reports to the Interstate Commerce Commission? A. No. We are not an interstate commerce road.

Q. You had nothing to do with that? A. No.

Q. That was not the question. I asked whether the Interstate Commerce Commission reports, concerning which you testified you had some familiarity with, follow substantially the same classification? A. They do, yes.

Q. Is there in this report to the Railroad Commission any item which is designated an operating debt? A. You mean the report shows those words "operating debt"?

695 Q. So far as you know, are those words used to classify any account in the railroad report?

Mr. Whittlesey: You mean the phrase "operating debt"?

Mr. Bickford: Operating debt.

The Master: Have you brought out what system of accounts was used by the Third Avenue Railroad Company at the time they executed this mortgage?

Mr. Bickford: No.

696 A. There is no specific use of the words "operating debt" within this report, to the best of my knowledge and belief.

Q. You would classify under that report of unpaid debts of the company within one of those three headings to which I have called your attention, would you not, Funded Debt, Real Estate Mortgages, or Floating Debt? A. No, I would not. There are liabilities of a corporation which would not, in my opinion, fall under those three classifications.

Q. Did this report call for any other classification? A. That report did.

Q. What were they, accounts payable? You refer to unpaid taxes, unpaid dividends, unpaid coupons? A. Unpaid coupons I would consider a floating debt. 697

Q. And accounts payable? A. Accounts payable, in my opinion, are not a floating debt unless they are represented by an instrument in writing.

Redirect-examination by Mr. Whittlesey:

Q. Mr. Brown, do you know of any classification of obligations which would be covered by the phrase "Operating Debt," which was in general use in the year 1900 when the Third Avenue mortgage was made? A. I know that there were items which in my opinion would be considered as an operating debt, but whether the phrase was ever used, such a designation, it is not on the books of the company to my knowledge, but there are many items which in my opinion would be included in that category. 698

Q. In your opinion were charges for interest on construction notes and balances for construction purposes operating debt?

Mr. Bickford: I object to that because it appears that those words have no definite meaning, were not in general use, and there was no such account on the books of the company, all of which appears from the witness's previous answer. 699

The Master: I will overrule the objection and let him answer for what it is worth.

A. Any interest which accrued on construction advances and money obtained for construction after the completion of the construction work which remained unpaid, would in my opinion be an operating debt.

700 By the Master:

Q. And that opinion is based on your idea that every debt of a railroad company, if it is not for construction purposes, is an operating debt? A. Not for capital purposes.

Q. What? A. Not for capital purposes.

Q. But aside from that? A. Aside from that, yes.

Recross-examination by Mr. Bickford:

Q. Mr. Brown, wouldn't it be more accurate to say that all interest was a proper deduction from
701 income rather than to say it was an operating expense or an operating debt; is not that a more accurate statement? A. The statement is inaccurate, because you are talking about two separate and distinct things; you are talking about a debt and an expense, and the debt is merely an unpaid item.

Q. It is an unpaid expense? A. Not necessarily an unpaid expense in that sense, the technical sense as applied to operating expense; it is an expense of operating in my opinion, for the reason that it is a charge against your revenue derived
702 from the operation of your property.

Q. Isn't it an expense to be deducted from the revenue derived from all sources? A. That is true.

Q. It is a deduction then to be made from all the income of a corporation rather than from the income of any particular source? A. That is true; yes, sir.

J. R. C. Armstrong, called as a witness on behalf of the claimant, being duly sworn, testifies as follows: 703

Direct-examination by Mr. Whittlesey:

Q. Mr. Armstrong, what is your occupation? A. Electrical engineer for the Receivers of the Metropolitan Street Railway Company.

Q. And prior to that in the same position for the Receivers of the New York City Railway Company? A. That is correct.

Q. And prior to that for the New York City Railway Company? A. That is correct. 704

Q. What was the date of your earliest connection with the New York City Railway Company? A. October the 1st, 1906.

Q. Were you prior to that time connected with any of the street railway companies in the City of New York? A. Not of the street railways companies, no; indirectly I was in the construction of the street railway companies on the construction side.

Q. What experience have you had as an electrical engineer, generally? A. Prior to accepting the position of electrical engineer for the New York City Railway Company I was transmission 705 engineer for the New York Central and Hudson River Railroad Company's lines. I occupied that position for approximately two years. Prior to that time I was connected with the electrification of the Elevated, the Subway, and the erection of the New York Edison Waterside plant.

Q. Are you familiar with the cost of producing and transmitting electrical power in the City of New York? A. I am.

Q. And with the prices charged for electrical power generally in the City of New York? A. I am.

706 Q. And in particular are you familiar with the cost of the production and transmission of electrical power for the operation of street railroads? A. I am.

Q. And with the prices charged for electrical power on street railroads? A. Yes, sir.

Q. Since your connection with the New York City Railway Company, what have been the power houses at which electrical power was generated for street railway systems in New York City? A. The Ninety-sixth Street power station, Ninety-sixth Street and First Avenue, and the Kingsbridge power house, in the vicinity of 218th Street
707 and Kingsbridge Road.

Q. Do you know whether or not, power, electrical power, was furnished from those power houses to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. Not directly; it was generated in those power houses.

Q. And was it transmitted to the lines operated by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. Transmitted to sub-stations supplying power to the lines operated by the Forty-second Street,
708 Manhattanville and St. Nicholas Avenue Railroad Company.

Q. You were in general charge of the electrical department of the street railway system, were you? A. That is correct.

Q. Have you records in your department showing at what points and in what amount electrical power was furnished to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company?

By Mr. Bickford: 709

Q. Did you make up those records yourself? A. No; they were made up under my direction, though.

By Mr. Whittlesey:

Q. You have such records, have you? A. I have.

Q. Do you know at what point electrical power was furnished to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. I do.

Q. Do you know whether the power furnished to that company was metered? A. I do. 710

Q. Was it? A. Yes.

Q. The furnishing of power to the Forty-second Street Road and the metering and the keeping of the records of the amount of power furnished was under your immediate charge, was it? A. That is correct.

Q. At what points was power furnished to the Forty-second Street, Manhattanville and St. Nicholas Avenue Road? A. It was furnished from the Twenty-fifth Street sub-station located on Twenty-fifth Street, between Lexington and Third Avenues, from the Fiftieth Street sub-station, Fiftieth Street and Sixth Avenue, and from the 129th Street sub-station, located at 129th Street and Amsterdam Avenue. 711

Q. The power was generated at one of the two main power houses to which you have referred, was it not? A. Generated in both.

Q. And how was it transmitted thence to the sub-stations? It was carried through cables to the sub-stations, was it not? A. From the power houses to the sub-stations, yes.

Q. And where were the meters located which measured the power furnished to the Forty-sec-

712 ond Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. In the sub-stations.

Q. How was the amount of power so furnished reported to you? A. A record of the power furnished to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad line was kept by the operators in the stations.

Q. In the sub-stations? A. In the sub-stations, in each of the sub-stations.

Q. How were they kept, day by day, or hour by hour? A. Hour by hour.

Q. They were regularly required to be kept hour by hour, were they? A. That is correct.

713 Q. And when the operator read the meter, what entry, if any, did he make?

By Mr. Bickford:

Q. Did you make those records yourself, Mr. Armstrong? A. No, I did not.

Mr. Bickford: I object to this witness as not qualified to testify on this subject, and I object to this whole line of evidence for the reasons already stated in the objections which I have made, namely, that it now appears that the interest charged in this account far

714 exceeds the balance for which the note in question was given, and therefore there could be no recovery; and, for the second reason, that the last item of power or of any other operating expense which could have entered into this note was furnished and charged for prior to April 30, 1907, and under the terms of the mortgage the claimant cannot recover, if it can recover for operating advances or expenses at all, it cannot recover for items incurred more than six months prior to the assertion of the claim.

The Master: I think this motion presents 715
a very serious question, and, in view of the information we have from the claimant with respect to the great amount of time that will be required to prove all of the items charged upon this account by legal evidence, the reasonable value thereof, and as this motion of Mr. Bickford's, if well founded, would dispose of the claim and do away with the necessity of this very great amount of proof which would, as counsel states, occupy such a very long time, I will take the motion under consideration and dispose of the same prior to 716
a date that may now be agreed upon to which this hearing is adjourned, and I will set a time for hearing arguments for and against the motion, if counsel should desire, for receiving briefs for or against the motion, if counsel should so desire. I will leave it entirely to them whether they want to make any argument or file any briefs.

Mr. Whittlesey: In answer to Mr. Bickford's first objection that the witness did not himself make the meter readings, I would say that I have here the original log sheets, which are the original meter readings, and they are 717
signed by the different individuals who were in charge of the readings, and made the readings from time to time during the separate days. These other men who actually made the readings I offer to produce here. I merely have Mr. Armstrong here to-day, because he has certain data in bulk which I want to get in, and I will offer to connect his testimony with the testimony of the men who actually made these entries which I wish to offer in evidence. Mr. Armstrong is here prepared to testify that these are the original reports

718 which were made to him and from which he made his report to the auditor. I am prepared to prove these amounts, and also prove by Mr. Armstrong, who has qualified as an expert electrical engineer, not only the prevailing prices for electrical power in the City of New York during the period which I wish to cover, but also the actual cost of the furnishing of such power so as to show the rate which was charged to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, even irrespective of its contract, was in every respect reasonable.

719 Mr. Bickford: I assume that Mr. Whittlesey may be able to overcome the technical objection—

The Master: The part of the objection that Mr. Whittlesey now refers to is not the part that I had in mind. That Mr. Bickford suggests may be easily corrected. I am not considering the competency of this particular witness to testify, but whether, assuming the competency, the evidence can have any probative force, to be of any use whatever, in view of the fact that the amount charged for in-

720 terest on this open account exceeds the balance of the account for which the note was given. Mr. Bickford's objection, which I understand amounts to a motion to dismiss the claim, is, as a matter of law, the charge for interest is not a proper operating debt within the meaning of those words as used in the Third Avenue mortgage. If he is right about that, then the claim should be dismissed, and it is upon that question of law that I would be very glad to hear the parties and receive briefs, and which I think should be consid-

ered at that time for the reasons that I have given. 721

Mr. Bickford: I call the attention of the Master to the fact that it now appears that the account which he has already disallowed, namely, from April 30th down, and in which he has been sustained by the Circuit Court, is a mere continuance of the account in question here, and the system of charging interest prior to April 30, 1907, was precisely the same as that followed after April 30, 1907. The decision of the Master, in which he was sustained by the Circuit Court, was that interest 722 exceeding the amount of the balance there could be no recovery on. It seems to me, therefore, that that is *res adjudicata* as to this claim.

The Master: There are more points in this situation than the one that was involved there. The question here whether that interest was an operating debt was not raised and ruled on in disposing of the claim on open account. If a charge for interest on a construction account is not an operating debt, this claim may now be dismissed for that reason. 723

Mr. Whittlesey: I am offering the testimony of electrical power with a view to taking advantage of the decision of the Circuit Court which allowed us to prove any portion of the consideration for the note given to the New York City Railway Company, which consisted of current operating debt; and my offer is made following out the permission so given, and I will follow the proof as to electrical power by proof of the other items of the account for other operating expenses.

724 The Master: At the same time you admit that the note was given to discharge the balance due upon this general open account?

Mr. Whittlesey: I do.

The Master: And that this very account of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company was charged with interest on construction account in an amount exceeding the balance?

Mr. Whittlesey: That appears in evidence.

The Master: That fact appears in evidence, and raises a question of law.

725 Mr. Whittlesey: I think it is advisable to get the question of law settled here; but in view of the decision of the Circuit Court, I wish to have it appear perfectly clear that I am prepared to go ahead, and now offer to go ahead and prove the other items of the account.

Mr. Bickford: I think that clearly appears; and I wish to call attention to the distinction made between operating debt and interest. Had the Court intended to permit you to come here and prove interest, there would have been no occasion whatever for limiting

726 the items for which you might take proof of operating debt. That very distinction was made so as to exclude you from the right to prove interest.

The Master: That statement of yours begs the whole question, which is, whether or not the interest is an operating debt.

Mr. Bickford: The Court had the whole question before it.

The Master: If by the words "operating debt" the Court intended to exclude interest.

The Court: It did not.

The Master: That is the whole question.

Mr. Whittlesey: The only question before us is what the Circuit Court intended by its order. 727

The Master: The Court in using those words quoted from the mortgage, and the question is what is the meaning of those words as used in the mortgage, whether that is sufficiently broad to include interest on construction account.

Mr. Bickford: I think it goes further than that, I think it is perfectly apparent that the Court intended by using those words to exclude interest, because it had sustained in the very same breath an objection to an account where it appeared that the interest exceeded the operating item. 728

The Master: It did not sustain it on the ground that it was not an operating debt.

Mr. Bickford: That is true enough. The mortgage was before the Court, and presumably it was sustained on all grounds.

Mr. Whittlesey: I understand the decision on Mr. Bickford's motion and to dismiss the whole claim is reserved?

The Master: We will take an adjournment if you wish, so that you can file a memorandum. 729

Mr. Bickford: I have Mr. Martin here, if the Master wishes any further testimony as to the relations of the various officers and directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company during this period with the New York City Railway Company, and some other companies in the system.

The Master: I would like to hear Mr. Martin's testimony.

730 REUEN MARTIN, called as a witness for the Receiver of the Third Avenue Railroad Company, being duly sworn, testified as follows:

Direct-examination by Mr. Bickford:

Q. Mr. Martin, were you a director of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company in 1907? A. Yes, sir.

Q. And do you remember what year you were first elected a director? A. No, I cannot answer that.

Q. Was it 1900, after the railway was first taken
731 over under the lease? A. It is very soon after Colonel Jay was discharged as receiver, within a month.

Q. And from the time of your first election down to the present time, you have been a director of that company, or down to January, 1908? A. Yes, sir.

Q. Were you employed in any way by the New York City Railway Company during that period? A. It is difficult for me to answer that because I cannot tell whether it was the Metropolitan or the Interurban or the New York City that I was employed by.

732 Q. What were your duties during that period as an officer or employee? A. I was in the auditor's office and in the secretary's office.

By Mr. Whittlesey:

Q. Of what company? A. Of the Metropolitan Street Railway Company or New York City—I cannot recollect when the title changed—and in the purchasing department.

Q. Of the same company? A. Of the same company, and in the general manager's office.

By Mr. Bickford: 733

Q. Did you receive any salary from the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. No.

Q. Did you own any stock in the Forty-second Street Company? A. No, sir.

Q. Five shares appear to have stood in your name. Did you own them? A. No, sir.

Q. How did you come to get them? A. They were issued to qualify me as a director in the Forty-second Street Company, and I signed an assignment in blank at the time they were put in my name. 734

Q. And delivered the certificate to somebody? A. I never held the certificate.

Q. You never held it? A. No, sir.

Q. It was simply handed to you long enough to let you endorse it? A. Exactly.

Q. Do you know how you came to be elected a director in the first place? A. No, I have no very clear recollection.

Q. You do not remember who spoke to you about it? A. No, I do not.

Q. Were you nominated by anybody having a large interest or a substantial interest in the stock of the company? 735

Mr. Whittlesey: I object to that.
Objection sustained.
Exception by Mr. Bickford.
Exception by Mr. George.

Q. Do you remember Frank B. Jackson, who was a director of the company? A. Yes, I remember seeing him at meetings.

Q. And do you know whether he was in the employ of the Metropolitan Street Railway Company or the City Railway Company? A. I am sure that he was.

736 Q. Do you know what his business was? A. No.

Q. Did you notice Thomas J. Reagan? A. Yes.

Q. What was his business? A. I first knew him when he was Mr. William C. Whitney's private secretary, and after his death I understood that he was employed by the estate of William C. Whitney.

Mr. Whittlesey: I move to strike out the last part, as to what the witness understood.

The Master: Strike it out.

737 Q. Do you know whether he was ever employed by the New York City Railway Company or the Metropolitan Street Railway Company? A. No.

Q. You do not know? A. No, sir.

Q. Who was Daniel H. Shea? A. He was Mr. Thomas F. Ryan's private secretary.

By Mr. Whittlesey:

Q. At what period? A. As long as I have known him.

Q. Is he now? A. I do not know now; I have not seen or heard of him since at least three years.

738 By Mr. Bickford:

Q. Was he employed in any way, so far as you know, by the City Railway Company or the Metropolitan Street Railway Company? A. Not that I know of.

Q. Who was William K. Ryan? A. He was the son of Thomas F. Ryan.

Q. Was he employed by the New York City Railway Company or the Metropolitan Street Railway Company? A. He had been for a short time.

By Mr. Whittlesey: 739

Q. Can you fix the time? A. No, sir, except it was during the time that I was employed by the Company, somewhere between 1898 and— Well, it was between 1898 and 1902, I am sure.

Q. You do not know whether it was after 1900 or not? A. I should say not.

By Mr. Bickford:

Q. Not after 1900? A. I should say not, no.

Q. Who was John B. Johnson? A. All I knew of him he was a friend of Mr. Beaver's; I never knew anything about him at all. 740

Q. You do not know whether he had any employment with the New York City Railway Company or the Metropolitan Street Railway Company? A. I am quite sure he did not.

Q. Who was Henry A. Himely? A. He was connected with the American Air Power Company that had to do with the operation of their air power cars on Twenty-eighth Street.

Q. And he was not an employee of the New York City Railway Company? A. No.

Q. Or the Metropolitan Street Railway Company? A. No.

Q. James J. Traynor? A. I cannot remember him at all. 741

Q. Thomas Robbins, Jr.? A. I remember him, but I do not know of his ever having been connected with the company in any way.

Q. Except as a director? A. Except as a director.

Q. Of the Forty-second Street Road? A. Of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company.

Q. Do you know whether any of these gentlemen I have asked you about were directors of other

742 companies in the system—Frank B. Jackson, Thomas J. Reagan, Daniel H. Shea, William K. Ryan, John B. Johnson, Henry A. Himely? A. I cannot remember that they were.

Q. Now, what do you say about Mr. Robbins? A. I cannot say anything about him, except that I never knew him at all as an employee of any of the railroad companies.

Q. Frank S. Rollins? A. I would have to say the same thing of him.

Q. J. Sanford Barnes? A. And of him.

Q. Pierre Jay? A. Pierre Jay was the President of the Second Avenue Railroad Company at
743 one time I know, and he was also President of the Central Crosstown Railroad.

By Mr. Whittlesey:

Q. Do you know approximately what time that was, can you fix a date? A. No.

Q. Prior to 1902? A. Well, prior to that; possibly after, but I am not clear on that.

Q. You do not know whether it was after the lease to the Interurban in February, 1902? A. No, I cannot fix those dates.

Q. I did not know but what the change of man-
744 agement of the New York City Railway Company might have helped you? A. You mean the lease of the Central Crosstown.

Q. No, I do not.

By Mr. Bickford:

Q. What was John Beaver's employment? A. I first knew Mr. Beaver as treasurer of the Third Avenue Railroad Company. When that was leased by the Metropolitan, he continued in that office, I think, and at the same time assisted Mr.

Warren, secretary and treasurer of the Metropolitan Company in many different ways. 745

Q. And he was the President of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. Yes, for some considerable time, and was up to the time I was ousted.

Q. Do you know whether he was a director of other companies in the system? A. Yes; I know he was a director of the Central Crosstown, but I cannot state positively.

By Mr. Whittlesey:

Q. Do you know whether he was employed by the Metropolitan or the New York City? A. I know he worked in the office there, but whether he was paid by them or not I could not say. 746

Q. You knew Mr. Warren was secretary also of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company at that time? A. Yes.

By Mr. Bickford:

Q. Who was John Byrns? A. He had years ago—I cannot state when at all—been connected with the Dry Dock, East Broadway and Battery Railroad Company, and he was a director in the Central Crosstown Railroad at the time I was. 747

By Mr. Whittlesey:

Q. During the whole period when you were? A. I am pretty sure he was, yes, sir.

By Mr. Bickford:

Q. Who was Edwin Wolf? A. Wolf was the superintendent of the Forty-second Street road,

748 the operating superintendent, and had charge of the men and the running of the cars.

Q. Did he hold any position with any other company, so far as you know? A. No, not at that time. Prior to his employment there he was with the Third Avenue Railroad Company, and before that for a good many years he was with the Union Railway Company.

By Mr. Whittlesey:

Q. That is, with the Third Avenue prior to 1900? A. No, I do not know anything about the
749 Third Avenue prior to 1900, but I mean he was employed on the Third Avenue Division.

Q. After 1902? A. I could not say as to that; but after 1900, because prior to 1900 I did not know anything about the Third Avenue.

By Mr. Bickford:

Q. Was J. Sanford Barnes, Jr., the same as J. Sanford Barnes? A. Yes, sir.

Q. Who was Edward J. Hatch? A. He was an employee of the Metropolitan Street Railway Company in the office of the secretary of the com-
750 pany; I do not know that he ever held a title of any kind.

Q. An assistant to the secretary? A. Well, as I remember him he was more sort of a head office boy than anything else, in charge of the younger office boys.

By Mr. Whittlesey:

Q. The secretary you refer to is Mr. Warren? A. The secretary I refer to is Mr. Warren.

By Mr. Bickford: 751

Q. Who was Frank F. Ogston? A. He was an employee of the Metropolitan who looked after certain matters pertaining to their real estate interests, and also the taxes, matters where it was necessary to keep in touch with the City departments, and matters of that kind.

Q. Who was George Yardley? A. I do not remember him at all; I could not place him.

Q. George W. Linch? A. Linch, I only knew as a director in the Central Crosstown road, aside from this connection.

752

By the Master:

Q. Were you a director of the Central Crosstown Railroad? A. Yes, sir.

By Mr. Bickford:

Q. You do not know whether he had any employment with the New York City Railway Company or with the Metropolitan? A. I think not.

Q. Who was W. A. Anderson? A. He was Mr. Vreeland's—I do not know whether he called him private secretary or not, but that is about what he did. 753

Q. That is, he was employed by the New York City or the Metropolitan? A. Yes.

Q. He was not his personal private secretary? A. No, he was promoted from the legal department of those companies to be Mr. Vreeland's stenographer and secretary.

Q. Who was A. V. Porter? A. He was employed by the Metropolitan for a considerable period as an architect and superintendent of construction of their buildings.

Q. Do you know whether he performed those

754 duties in respect of all the companies in the system? A. No, I do not really know what he did do.

Q. Frank S. Gannon, who was he? A. He was the first vice-president of the Metropolitan and of the Interurban; I am not sure whether he was in the New York City when it was called the New York City or not.

By Mr. Whittlesey:

Q. You do not know whether his connection then went beyond the date of the change of name from Interurban to the New York City? A. No, I am
755 not clear on that.

By Mr. Bickford:

Q. Who was James I. Burke? A. He was employed, as I remember it.

Q. He was trust officer in the Morton Trust Company? A. Then he is not the man that I had in mind. The man I have in mind was a practicing lawyer; there may be another man.

Q. Who was Thomas A. Maher? A. He is the son of the President of the Union Railway Company to-day.

Q. He held an official position with the Forty-
756 second Street Company. Do you knok whether he devoted all of his time to that company, or whether he had other employment in the system? A. I think he was exclusively employed by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, only for a short time after the receiver was discharged.

Q. R. L. Anderton, Junior? A. He was the stock transfer agent for the Metropolitan Street Railway Company.

By Mr. Whittlesey:

Q. For the Metropolitan? A. Yes, sir.

By Mr. Bickford: 757

Q. And for the New York City? A. I assume that he was, but I do not know; yes, I am sure about him, because I know he was there up to the time of the receivership.

Q. Charles E. Warren? A. He was the secretary and treasurer of the Metropolitan Street Railway Company and the Interurban and New York City Railway.

Q. And held official positions with numerous other companies at this time, didn't he? A. A number of them, yes.

Q. Oren Root, Junior? A. He was the assistant 758
general manager of the New York City Railway Company.

Q. And he was elected general manager of various other companies in the system, was he not? A. Yes.

Q. D. C. Moorehead? A. He was the auditor of the New York City Railway Company and held various positions with the other affiliated companies.

Q. Do you remember attending a meeting of the directors of the Forty-second Street Company that was held June 27, 1907, at which a plan for the adjustment of certain accounts and notes and the 759
giving of new notes was presented and acted upon? A. My memory is not clear on that meeting.

By the Master:

Q. Were you at the meeting? A. I know now I was at the meeting, because I have been told that it so appears in the minutes. I also had to attend a number of other meetings where practically the same business was transacted, and I cannot dissect one from the other because they were all along the same lines.

760 Q. Was a plan for the adjustment of these accounts as between all companies submitted to you in advance of this meeting? A. Yes, I had known about it for some time.

Q. That is, the plan which was submitted in typewriting had been submitted to you in advance of the meeting? A. No, I would not say that, but the idea and the general intention had been.

Q. You were in the auditor's office? A. Not then.

Q. You were not? A. No, sir.

By the Master:

761 Q. Where were you then? A. I was in the employ of the Union Railway then.

Q. In what capacity? A. Secretary and treasurer.

Q. What you knew was there was a plan on foot to reduce obligations to the form of promissory notes, or just what was it you knew about it in advance? A. A plan was proposed to take up all the open accounts between the various companies and give notes in their place, and the same idea was carried out in regard to the Union Railway Company.

762 Q. To take up the open accounts? A. Yes, sir.

By Mr. Bickford:

Q. Do you know whether that plan was submitted to all the directors of the Forty-second Street Company prior to this meeting? A. I do not know, no.

Q. You never heard that it was? A. No.

By the Master:

Q. Do you know who made the plan, where the

plan came from? A. Well, I know where my knowledge of it came from. 763

Q. Where from? A. From H. W. Brown, the auditor and comptroller.

Q. The auditor of what? A. Of the New York City Railway Company.

By Mr. Bickford:

Q. Did you look into this, make an independent examination of this plan? A. No. You mean an examination of the books.

Q. No, I mean of the plan, in order to form an independent judgment as to whether it was a proper plan to be adopted by the Forty-second Street Road? A. No. 764

By the Master:

Q. Do you recollect the vote of the directors of the Forty-second Street Railroad to issue notes at that meeting? A. No; I have not anything particularly to recall that part.

By Mr. Bickford:

Q. I think you were secretary of the meeting, were you not? A. I acted as secretary in a number of the meetings that were held at 177 Manhattan Street, I know. 765

Q. Do you remember, Mr. Martin, whether there was any discussion at that meeting as to the advisability of adopting such a plan as that, or whether the plan was produced in resolutions approving it and they were adopted without discussion? A. I have already said I cannot recall this meeting as a separate proposition at all.

Q. You have no recollection of there having been any discussion of the matter? A. No, I do not remember any adverse discussion at all.

766 By the Master:

Q. Did you attend any other meeting of directors on that same day? A. The Union meetings were held on June 26th.

Q. Were you a director of the Union Railway Company? A. Yes.

Q. Did you attend that meeting? A. I attended those of the Union, Westchester, Southern Boulevard, and Yonkers and Tarrytown.

By Mr. Bickford:

767 Q. At all those meetings similar plans, that is, appropriate for the proper companies, were presented and acted upon? A. Exactly similar plans were presented, and as far as I can remember, the procedure was very much the same. An explanation of the intention of the meeting, in brief, as stated in this memorandum that was made a part of the minutes of these meetings.

By the Master:

Q. Do you know who presented the memorandum at the meeting of the directors of the Forty-second Street Railroad? A. No, sir, I could not recall.

768 Mr. Bickford: I think that appears in the minutes themselves.

Q. Who was the treasurer of the Forty-second Street Railroad at that time? A. Mr. Warren.

Q. Who was Mr. John Beaver? A. Mr. John Beaver was the president of the Forty-second Street road.

Q. What else was he, if you know? A. I know that he, as a matter of fact, assisted Mr. Warren, the secretary and treasurer of the New York City Railway Company, but I cannot say that he was employed and paid by him in that capacity.

By Mr. Whittlesey: 769

Q. Mr. Warren was at the same time secretary and treasurer of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, was he not? A. Yes, sir.

By Mr. Bickford:

Q. Do you know whether any payments were made to Mr. Beaver by the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. No, sir, I do not know it.

Q. So far as you know at the time you were a director of the Forty-second Street, Manhattan- 770
ville and St. Nicholas Avenue Railroad Company, the question of the compensation of Mr. Beaver was never before the Board? A. No.

Q. Was that true of the other officers of the company? A. I have no recollection of any matter of salaries ever appearing before the Board.

Q. You received no salary from that company, did you? A. No.

By the Master:

Q. Do you recollect any discussion in the meetings of the board of directors of the Forty-second 771
Street Railroad Company with respect to the policy of the Forty-second Street Railroad or with respect to any action; do you recollect there ever being a debate on any subject at any meeting of the directors of the Forty-second Street Railroad? A. I remember very distinctly a desire on the part of these directors to be informed of what the intention or purpose of any resolution that was presented was, but I do not know that I ever heard of any contest.

772 By Mr. Whittlesey:

Q. You do not recall now any specific discussions? A. No, I do not, but I do remember, generally speaking, they wanted to know what the purpose of a resolution was and why it was made, and Mr. Beaver was always very particular to give them a very full, reasonable explanation of all these things.

By Mr. Holbrook:

Q. Who drafted these resolutions that were passed at the various meetings?

773 Mr. Whittlesey: During the whole period.

A. You mean about these notes?

Q. Yes. A. I do not know. As I say, my knowledge of the general plan as it applied to any companies that I was interested in came to me from Mr. Brown, the comptroller.

By the Master:

Q. Of the New York City Railway Company? A. Yes, sir. But he also acted in the capacity for the Union lines, too, that I was interested in.

774 By Mr. Holbrook:

Q. Was not there a lawyer present at these meetings, board meetings?

Mr. Whittlesey: A lawyer not on the board, you mean?

Mr. Holbrook: Yes.

A. I do not think there was a lawyer in that bunch present.

By Mr. Bickford: 775

Q. Do you know whether Mr. Cravath was present? A. No.

Q. Mr. Cotton? A. No.

By the Master:

Q. Mr. Martin? A. No.

By Mr. Bickford:

Q. The counsel for the company at that time was Mr. Martin, wasn't he? A. Oh, no; at least I never knew. 776

By the Master:

Q. Do you know who was counsel for the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. I have my own opinion about it, but I do not know through paying him any salary or anything of that kind, who it was.

By Mr. Holbrook:

Q. Did not a lawyer generally attend these board of directors meetings from Mr. Cravath's office? 777

Mr. Whittlesey: I wish you would confine yourself to some date.

Mr. Holbrook: I mean all of these meetings of the board of directors.

A. It was very unusual when a lawyer did attend a meeting that I was at.

By Mr. Whittlesey:

Q. In any of these companies? A. In any of

778 these companies. There was a time when Mr. Henry A. Robinson was a director in the five companies.

Q. He was a director of the Dry Dock? A. I do not know that. He retired from that, and for a long time we had no director who was a lawyer.

Q. On the board? A. On the board. I am quite certain that no lawyer ever went to 177 Manhattan Street to attend a directors' meeting. That is, where this one was held.

Q. That is, where this Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company meeting was held? A. Yes, sir.

779

By the Master:

Q. Did you sign the minutes of this meeting? A. I would have to leave that to the minute book; I do not recollect.

Q. You do not recollect? A. I feel pretty sure I did, because Mr. Warren was secretary and hardly ever came up there, and when he was not there I acted as secretary and signed the minutes.

Q. Did you sign the minutes at the meeting? A. No; we usually had them in skeleton form beforehand.

780 Q. Where did you get the minutes? A. Mr. Beaver furnished them.

By Mr. Whittlesey:

Q. The President? A. Yes. I never had anything to do with it at all.

Q. The meetings of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company were held generally at 177 Manhattan Street and not at 621 Broadway? A. I cannot remember attending a Forty-second Street meeting at 621, no.

Q. With reference to the members of the Forty- 781
second Street, Manhattanville and St. Nicholas Avenue Railroad Company board of directors, particularly Mr. Ogston, Hatch, Anderson, Porter, and Mr. Gannon and Mr. Maher, whom I understood you to say were employees of the Metropolitan or New York City, you do not know anything about the fact of their salaries, or who paid their salaries, do you, personally? A. Cut out Mr. Maher; I never meant to say he was employed by the Metropolitan at all; I do not think he was.

Q. I guess you did not. A. Who are they, one by one?

Q. Ogston? A. Yes, I know he was paid by the 782
Metropolitan and New York City Railway Company.

Q. Do you know the same of Mr. Hatch? A. Yes, I did; and I knew what his salary was, too; it used to be a great thorn in my side.

Q. Have you any doubt that there was a great deal of information from time to time in reference to the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company and its affairs about which you have been asked to-day, which, from the lapse of time, you cannot now recall? I understood you to say you kept yourself 783
informed, the board of directors kept generally informed about the resolutions? A. Yes.

Q. Did you, and, so far as you know, the other members of the board actually keep informed as to the affairs of the Forty-second Street Road? A. Not as to the operation of the road.

Q. Not as to the operation of the road? A. No. What I want to say is when the board of directors held a meeting and a resolution was presented, as it very often was by Mr. Beaver, we did not simply vote because Beaver said yes; we made him explain to us why the thing was reasonable and why they wished to do it.

784 By the Master:

Q. Who do you mean when you say "they"? A. Why, Mr. Beaver wished to do it. And as far as the receipts and detail of operation was concerned, we did not concern ourselves.

By Mr. Whittlesey:

Q. The Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company was separately operated during that time? A. Yes, sir, entirely.

785 By the Master:

Q. Did the board of directors do anything except act on resolutions presented by Mr. Beaver? A. It would not be fair for me to say Mr. Beaver presented all the resolutions; I could not say that, but Mr. Beaver was the active member of the board.

Q. You do not recollect discussing the financial condition of the railroad and how it was getting along, and what it was earning, and what the company better do? A. No, I have no recollection of taking any particular interest in the results of
786 operation.

Q. Just what was it that the board of directors did, the board of directors of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, with respect to the operation of the road? Do you recollect anything? A. No, I do not.

By Mr. Whittlesey:

Q. Mr. Beaver was the man on the board who was actively in charge for the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad

Company, was he not? A. Yes, and I do not re- 787
member that we ever called upon him to make any statements of operating results.

Q. Except where they were involved in resolutions? A. Yes.

Q. Which the board was to act upon? A. Yes.

By Mr. Holbrook:

Q. At this meeting of June 27, 1907, you cannot recall that you were there at all? A. No, I cannot.

Q. You cannot recall a single person getting up and reading about a note for six million and odd dollars, and a note for a million and odd dollars? 788

Mr. Whittlesey: There was no note for a million dollars.

Q. Eight hundred and odd thousand dollars? A. No, I cannot separate that.

Q. The fact of hearing those sums did not make any impression on you at all? A. It may have made a great deal of impression on me at the time, I cannot remember it.

By the Master:

Q. You do not remember it? A. No, sir. 789

By Mr. Holbrook:

Q. You do not remember a single remark made about it by any of the directors as to why these huge notes were given? A. No.

Q. Do you remember to whom the six million dollar note, for instance, was made; to whom was that made? A. The Morton Trust Company.

Q. How do you remember that? A. I know that the notes were drawn to the Morton Trust Company, as Trustee under the Third Avenue mortgage.

790 Q. How do you know that? A. I cannot tell you in respect to the Forty-second Street road. I know there were five companies that paid me my living, and those were the ones I worked for and was interested in. I remember a good deal about those meetings, because I had a great deal to do with them and worked pretty hard. When there was a Forty-second Street meeting that was held, I went there and attended that meeting, and the procedure was exactly the same, as I understood, of the Union, and I let it go at that.

By Mr. Whittlesey:

791 Q. You had previously discussed the matter with Mr. Brown? A. I had, particularly with my companies that I was working for and who paid me my salary.

By the Master:

Q. Did you ever discuss the situation of the Forty-second Street road with Mr. Brown? A. I do not remember discussing that.

By Mr. Holbrook:

792 Q. Did you attend a good many other meetings of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company? A. Yes, sir, I imagine I did.

By the Master:

Q. You imagine you did? A. I know I did.

By Mr. Holbrook:

Q. And do you remember any resolution that was passed at any of them? A. Yes, sir.

Q. What, for instance? A. I remember a reso-

lution with reference to handling the traffic on Broadway when the Forty-second Street cars were operated down to Houston Street. 793

Q. Who offered that resolution? A. I do not know. We never put in the minutes, as I remember it, who the resolution was offered by.

By Mr. Whittlesey:

Q. Was there some discussion about that resolution? A. Yes, sir, it was thoroughly explained, and the directors wanted to know why that could be figured out as a profitable thing for the Forty-second Street Company, and an explanation was made why. 794

Q. And the board of directors, or you, at least, were convinced that that was a fair proposition for the Forty-second Street Company? A. Yes, sir, and I had other information about that that convinced me.

Mr. Bickford: It is stipulated that in April and May, 1907, the New York City Railway Company was the owner of 7,987 shares of the stock of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company, not pledged under the Third Avenue mortgage, and that by agreement dated May 22, 1907, between the New York City Railway Company and the Metropolitan Securities Company, the New York City Railway Company assigned, transferred and delivered all of the said shares to the Metropolitan Securities Company. The shares in question are the shares which appear upon the books of the Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company as standing in the name of James I. Burke, and a portion of the shares which appear by the 795

796 books to be standing in the name of H. H. Vreeland.

Mr. Whittlesey: The statement made by Mr. Bickford is stipulated, subject to correction that such is the fact, but the admissibility of that fact is objected to, and the testimony is objected to as irrelevant to the issues before the Master.

Adjourned to Friday, November 19, 1909, at 11 A. M.

797

New York, November 19, 1909.

Met pursuant to adjournment.

Appearances:

Dexter, Osborn & Fleming, Solicitors for William W. Ladd, Receiver of the New York City Railway Company. (George N. Whittlesey, of Counsel.)

Bowers & Sands, Solicitors for the Central Trust Company. (Middleton S. Borland, of Counsel.)

798

Evarts, Choate & Sherman, Solicitors for F. W. Whitridge, Receiver of the Third Avenue Railroad Company. (Herbert J. Bickford, of Counsel.)

Mr. Bickford: I now move to dismiss this claim upon the grounds that it appears that during the period covered by this account nearly all of the stock of the Forty-second Street Company was owned by the New York City Railway Company, and the latter company was in the position to wholly dominate and control, and did in fact

wholly dominate and control all of the acts of the 799
Forty-second Street Company; that while the railroads of the Forty-second Street Company were operated in the name of the Forty-second Street Company, they were, in fact, operated by and in the interests of the New York City Railway Company by officers and agents of the New York City Railway Company, and all of its books of account and records were kept in the office of the New York City Railway Company by persons employed by it and under the supervision and control of the auditor of the New York City Railway Company; that at least a majority of the directors of the 800
Forty-second Street Company were representatives of the New York City Railway Company, and many of them were employees of that company; that it appears from the record that in the accounts upon which this note was based, the Forty-second Street Company was charged with interest amounting to $1,230,690.40 upon the notes and accounts which were merged as of April 30, 1907, into the note for $6,491,967.44, payable to the Morton Trust Company, as trustee, under the First Consolidated Mortgage of the Third Avenue Railroad Company, which notes and accounts represented advances to the Forty-second Street 801
Company for new construction; that the New York City Railway Company was not entitled to this interest or to any part thereof; that all of said interest belonged to and is payable to the trustee under said mortgage; that if the New York City Railway Company was entitled to or had any claim to said interest, such claim was subject to the lien of said mortgage; that the balance shown by said account to have been due from the Forty-second Street Company on April 30, 1907, was $893,433.33, and the note for that amount to the New York City Railway Company upon which this claim is based was given for that balance; that if the said inter-

802 est, amounting to $1,230,690.40, had not been charged against the Forty-second Street Company in said account, there would have been no balance due from it to the New York City Railway Company; that no part of said interest is an operating charge, expense or debt; that if it be an operating charge, expense or debt, the last item thereof accrued not later than April 30, 1907, and is not a current operating expense, charge or debt, and was not incurred in the ordinary course of business; that under the terms of the said Third Avenue mortgage, the New York City Railway Company was never entitled to said interest or to any
803 part thereof; that if the New York City Railway Company was entitled to any part of said interest, such claim was subject to the lien of said mortgage and it lost all right and claim thereto after the lapse of six months from the date upon which the several items of interest accrued; that the said New York City Railway Company was not entitled to recover any of the other items appearing in said account; that if the New York City Railway Company was ever entitled to said items, or to any of them, its claim therefor was subject to the lien of said mortgage; that if the New York City
804 Railway Company was entitled to recover any of said items, it lost such right after the lapse of six months from the date the same accrued; that all of said claims had ceased to be claims for current operating expenses, charges or debts before this claim was asserted.

Mr. Borland: I join in Mr. Bickford's motion on all the grounds stated, and I move to dismiss on practically the same grounds, which are worded in a slightly different way, and have the grounds stated on the record show, so if there is any additional matter to be included in the motion Mr. Bickford has made.

First.—On the ground of the domination and control of the Forty-second Street Company by the New York City Railway Company through its voting power of a majority of the stock and its control of the members of the board of directors of the Forty-second Street Company from 1902 to subsequent to April 30, 1907, or thereabouts, the claimant must prove the *bona fides* of the transaction with the controlled company, and the charges made against it in said account were just, reasonable and proper and that the controlled company received the benefit of these transactions, if any of them are within Judge Lacombe's ruling, and the claimant has failed to do this. 805 806

Second.—On the ground that it now appears that the note of the New York City Railway Company on which the claim is based is a balance of account in which interest in an amount exceeding the face of the note was improperly charged, and that therefore there was no balance on this account due the New York City Railway Company on April 30, 1907, when the account was liquidated, and therefore in no event was the interest payable to the New York City Railway Company, and it was not entitled to charge the same in any event. 807

Third.—On the ground that the interest as charged in this account is not an operating debt and is not provable within the terms of Judge Lacombe's opinion referring this claim back to the Special Master.

Fourth.—That neither the interest sought to be proved in this account, nor the charges for power, for which this claim is made, or any other charge in the account, are provable items before the Spe-

808 cial Master in this claim within the terms of Judge Lacombe's opinion, and further that no items in this account, on the liquidation of which the claimant's note was given, can or do constitute an operating debt within the ordinary course of business, all of them having accrued and been charged prior to April 30, 1907, and without the term of six months, and therefore not within the terms of Judge Lacombe's order or under the mortgage.

Mr. Bickford: I unite in Mr. Borland's motions.

The Master: I am of the opinion that the motion to dismiss should be granted upon the ground that
809 interest due on promissory notes given for construction purposes is not a current operating debt incurred in the ordinary course of business, within the meaning of those words as used in the mortgage and the construction of the mortgage by the Circuit Court. I will take the question under consideration, however, and in the event that I should conclude the motion should be denied I will notify all parties in order that the hearings may be promptly resumed.

Mr. Whittlesey: I ask leave to submit herewith a memorandum in opposition to the motion cover-
810 ing such new points as have come up since the decision of the Circuit Court.

The Master: I will be very glad to receive this memorandum and any other memorandum or argument for or against the motion that the parties may desire.

Case submitted in accordance with the above.

CIRCUIT COURT OF THE UNITED STATES, 811

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendant. 812

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company. No. 172.

Master's Report on Rehearing.

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES: 813

I, EDWARDS H. CHILDS, Special Master, to whom by decree made and filed herein on the 8th day of February, 1908, it was among other things referred "to take proof of all claims and demands" against the above named defendant, do hereby respectfully make this separate report upon a rehearing of the claim of William W. Ladd, as Receiver of the New York City Railway Company, filed with me pursuant to said decree.

814 The claim as filed consisted of two separate parts, first, a claim for $107,830.54, as the balance due upon an open account, and, second, a claim upon a promissory note in the sum of $893,433.30.

Upon the open account, the defendant had been charged with interest on a certain promissory note in the sum of $6,491,967.44, dated April 30th, 1907, made by the defendant and held by the Central Trust Company, as substituted Trustee under the "First Consolidated Mortgage" of the Third Avenue Railroad Company. The total amount of interest thus charged was $181,053.73, and exceeded the balance claimed.

815 The claim on the promissory note was sought to be proved by the introduction of the note itself without further evidence and the defense sought to meet the case thus made by proof with respect to the relation of the parties at the time the note was given and to thus shift the burden of going forward with the evidence back to the claimant.

On May 4th, 1909, I filed in the office of the Clerk of this Court a separate report on this entire claim, concluding therein that the claim on open account should be disallowed for the reason that neither the New York City Railway Com-

816 pany nor its Receivers were entitled to interest on said note in the sum of $6,491,967.44, held by the Central Trust Company, as substituted Trustee, and that the amount of interest erroneously charged in said account exceeded the balance claimed and concluding further that the claim on the promissory note for $893,433.30 should be disallowed for the reason that the *prima facie* case made by producing and proving the note was met by the proof offered by the defense, that the burden of proving an actual consideration for the note was thus cast upon the claimant and was not sustained, all as more fully appears in said report.

Exceptions having been filed to said report and 817
a hearing thereon having been had, the Court by decree made and filed herein on the 15th day of June, 1909, confirmed the particular conclusions above referred to and then further decreed:

> "That this cause be remanded to the Special Master for a rehearing, and that on said rehearing the claimant be allowed to prove so much of the claim represented by the promissory note for Eight hundred ninety-three thousand four hundred thirty-three and 30/100 dollars ($893,433.30), as includes 'current operating debt incurred in the ordinary course of business.'" 818

The claim was accordingly brought on for a rehearing before me under the terms of said decree, pursuant to notice duly given to all parties. A number of hearings were had and I was attended by solicitors and counsel as follows:

For the claimant, William W. Ladd, as Receiver, by Messrs. Dexter, Osborn and Fleming, solicitors, by Mr. George N. Whittlesey, of counsel.

For the Receiver of the defendant Railway Company, by Messrs. Merrill and Rogers, solici- 819
tors, by Mr. Alfred H. Holbrook, of counsel.

For the Receiver of the Third Avenue Railroad Company, by Messrs. Evarts, Choate and Sherman, solicitors, by Mr. Herbert J. Bickford, of counsel.

For the Central Trust Company, as substituted Trustee of the "First Consolidated Mortgage" of the Third Avenue Railroad Company, by Messrs. Bowers & Sands, solicitors, by Mr. George W. Davison and Mr. Middleton S. Borland, of counsel.

820 I proceeded to take the proofs submitted by the parties and to hear arguments thereon and upon the proofs so taken, I find and report as follows:

Upon the opening of the case on this rehearing, counsel for the Receiver of the Third Avenue Railroad Company moved to dismiss the claim on the ground that it was barred by the terms of the Mortgage and counsel for the Receiver of the defendant and for the Trustee joined in the motion. The argument in support of the motion was that under the mortgage no claim for current operating debt that was more than six months old could
821 be enforced, that the note was dated April 30th, 1907, and could include no item of indebtedness incurred subsequent to that day, that the time within which any claim for operating debt (included in the note) could be enforced expired on October 30th, 1907, and that therefore the claim was barred and should be dismissed.

It is assumed in this motion and must be held to be the law of the case on this rehearing that the New York City Railway Company, by virtue of its lease from the Metropolitan Street Railway Company, was bound by the covenants with
822 respect to "Controlled Companies" contained in the Third Avenue Railroad Company's Mortgage and that those covenants may be enforced by the Trustee with respect to transactions which occurred while the lease was in force (Conclusions Ninth and Tenth, p. 26 of First Report). The defendant was one of the "Controlled Companies."

The provisions of the Mortgage relied upon are, first, that on page 34 which provides that:

> "The Railroad Company further agrees, covenants and guarantees that no indebted-

> ness of any of said Controlled Companies (except the current operating debt incurred in the ordinary course of business) shall be created."

823

and, second, that at the bottom of page 35 and top of page 36, which provides that:

> "If any Company of whose capital stock a majority is now pledged hereunder * * * shall (otherwise than is herein provided) create or suffer to be created * * * any indebtedness other than indebtedness to the Railroad Company or for the current operating expenses of such Company for a period not exceeding six months, then the Railroad Company will pay and discharge the same."

824

It was contended that the decree remanding the cause and permitting the claimant to prove the consideration for the note to the extent that it included "current operating debt incurred in the ordinary course of business" meant simply that the claimant was bound by the limitations imposed by the Mortgage (the words of the decree just quoted being taken from the Mortgage and being quoted in the decree itself); that the whole Mortgage was open for consideration and that the question whether the claim for "current operating debt" was not barred by some other provision was open. It was then further contended that the claimant could recover only for operating debts that were "current" when the claim was asserted, that the separate provisions of the Mortgage set forth above should be read together and that when so read it was clear that all operating debts included in the note had ceased to be "current" after the lapse of six months and were barred not later than upon the expiration of six months from the date of the note, that is, on October 30th, 1907,

825

826 which was prior to the time the claim was filed and prior to the appointment of a receiver for the defendant Company. I am not impressed by this argument. That each provision of the Mortgage must be read in the light of all other provisions to the end that the real intention of the parties may be ascertained is quite obvious but does not determine the question. The first clause relates to "current operating debt" and the second to "current operating expenses," and assuming that, in this connection, "operating *debt*" and "operating *expenses*" are the same, the second clause in
827 which the six months' limitation is found expressly excepts from its operation "indebtedness to the Railroad Company." It is difficult to follow the argument that there may be found in these provisions a contract by the Railroad Company that all current operating debts due to it from Controlled Companies shall be and become released upon the expiration of six months from their accrual, but however that may be it is perfectly clear that the question is not open on this rehearing. The whole Mortgage was before the Court, the decree is definite and certain on its face and no conditions or qualifications can be read
828 into the plain direction to permit the claimant to prove the note to the extent that it "includes 'current operating debts incurred in the ordinary course of business.'" The claimant was accordingly permitted to proceed.

In the course of the proceeding, certain additional evidence was offered on behalf of the defense of how the books of the defendant Company were kept and in support of the findings made in my first report on this claim with respect to the actual control of the defendant Company, the maker of the note in question, by the New York

City Railway Company, the payee thereof. No 829
objection was made upon the ground that any point had already been determined and in view of the probability that both reports may ultimately be reviewed by the Court of Appeals and of the importance of the questions involved, the evidence was received in the record. A part of this evidence would bear upon the question whether any proof offered by the claimant from the books of the defendant Company could be received as admissions against interest, but, excepting for its possible effect upon the kind of proof necessary, the evidence has no direct bearing upon 830
the particular questions to which this rehearing is limited. In view of the reasons hereinafter stated and for which I conclude that the claim must be finally dismissed on the merits, it is not necessary to consider the effect of entries made in the defendant's books and the evidence in question is here referred to simply to explain its presence in the record.

It appears that the note in question was given in payment of the balance claimed to be due on April 30th, 1907, upon an open account (S. M., 13). When the Metropolitan Street Railway Company took possession under its lease from the Third 831
Avenue Railroad Company of April 13th, 1900, it opened and maintained upon its ledger a general open account with the defendant Company starting with a balance against said Company on July 1st, 1900, of $5,288,411.01 and this account was continued by the New York City Railway Company when it took possession under its lease from the Metropolitan of February 14th, 1902. The New York City Railway Company opened its books on April 30th, 1902, the date when it took actual possession and its ledger account with

832 the defendant Company commences on that day and continues down to the Receivership. The account had no particular name on the books and was known simply as the account with the Forty-second Street Company (S. M., 127). It was a general open account and covered all charges made by the New York City Railway Company against the defendant Company, including charges for power, rent of tracks, rent of cars, cash fares collected by the defendant on its cars below Forty-fifth Street on Broadway (S. M., 27), interest on notes and moneys advanced for construction pur-
833 poses, etc., etc. All credits on account of cash received or otherwise were entered generally to the credit of the defendant upon this general open account. There was no other account of any kind with the defendant on the books of the New York City Railway Company (S. M., 130, 131). When the account was balanced as of April 30th, 1907, the sum of $893,433.30 appeared to be due thereon from the defendant and the note in question was given by the defendant in payment of that balance. The account was then continued by the New York City Company until it went into the hands of Receivers in September, 1907, and
834 thereafter by the Receivers and the claim on open account made herein and disposed of in my first report was for the balance due on this same account from April 30th, 1907, when it was balanced and the note given, up to February 1st, 1908, when a Receiver for the defendant Company was appointed. Transcripts, conceded to be correct copies of said account, as it appears upon the books of the Metropolitan and New York City Companies, from its commencement down to April 30th, 1907, are in the record upon this rehearing (Claimant's Exhibits D to J inclusive of November 13, 1909), not, of course, as proof of any

item thereon, but for the purpose of showing what 835
all of the items were that went to make up the balance for which the note was given and of thus stating the particulars of the claimant's case. Questions whether all of the items charged on the account are provable against the defendant as "current operating debt incurred in the ordinary course of business" are thus raised and are important, for if the credits more than equal the total charges that may be properly included within the meaning of those words, there will be nothing left in the case. It appears that among the charges made on the account were numerous items 836
charged as interest on alleged debts of the defendant Company for sums advanced by and notes given to the Third Avenue and Metropolitan Companies for construction purposes. The total amount of interest charged on all such advances and notes is $1,230,690.40 and of that sum $980,254.92 was charged for interest on construction notes given by the defendant (S. M., 122). The amount of the balance alleged to be due and for which the note in suit was given is but $893,433.30 and it follows that if these interest charges appearing in the account in question are not part of the "current operating debt" of the 837
defendant "incurred in the ordinary course of business," the claim must be dismissed on the merits.

Upon the appearance of these facts in the record a second motion to dismiss was made on behalf of the defense and in view of the fact that there was no prospect of the claimant's being able to complete his proof of the whole case in the near future and of the great amount of labor and the practical difficulties involved and as the grounds of the motion, if well founded, would finally dispose of the whole claim on rehearing the claim-

838 ant's proof was interrupted and the motion considered.

In opposition to the motion, it was contended that interest due upon a note given for construction purposes was an operating debt. The auditor for the New York City Railway Company who qualified as an expert in the subject of street railway bookkeeping testified that accounts were "divided into two general classes, capital account and operating accounts" (S. M., 60), that there was such a thing as an income account but that "income and operating accounts are substantially the same" (S. M., 69), that "as
839 a general rule the term operations is used to express the same meaning as the word income" (S. M., 119), that operating expense is a narrower phrase than operating debt, that "there is no comparison between operating expenses and operating debt," that "the operating expenses are a subdivision of the income account" (S. M., 119), that interest on indebtedness "does not come within the classification of operating expense" (S. M., 70), that there is a distinction between operating income and income from other sources, that interest is a charge against all the
840 income of a corporation rather than against the income from any particular source (S. M., 152-3), that "operating debt is not a technical phrase," that the words "operating debt" standing by themselves "would not contain any definite meaning" (S. M., 120), that interest on construction account would in his "opinion be an operating debt" (S. M., 152) because every debt except "for capital purposes" should be so considered (S. M., 152), and because in his opinion "income account" and "operating account" amounted to the same thing. In the form of report required by the State Board

of Railroad Commissioners for the year 1907, 841
substantially the same form which had been used
for some years prior thereto (S. M., 135), the gen-
eral "operating expense accounts" were required
to be stated in Table D of the report and charges
for interest were required to be stated in a sep-
arate schedule called Table C (S. M., 138, 142,
143 and 146). There was no classification of
"operating debt" in the form and those particu-
lar words were not used therein. Neither the
opinion of the auditor nor any particular classifi-
cation of accounts for the purposes of bookkeep-
ing, however, is controlling, for the real question 842
is, with what meaning were the words used in the
Mortgage. If upon the whole instrument the
sense in which the words in question were used
was not clear, such evidence might be resorted to
for the purpose of ascertaining what the inten-
tion of the parties was, but upon the Mortgage
here involved and the construction thereof by the
Circuit Court: I think it is perfectly clear that
the parties did not intend that the words "cur-
rent operating debt incurred in the ordinary
course of business" should include every liability
that could properly be charged in a general in-
come account but intended rather to thereby limit 843
the debts that Controlled Companies could create
to those incurred for "operating" in the more
strict sense of that word, and that this clearly
excludes interest on notes given for construction
purposes. It is not necessary for the purposes
of this claim, even were it possible, to formulate
any exact or exclusive definition of the phrase,
for the amount charged for interest on construc-
tion notes exceeds the amount of the claim and
if I am right in my opinion that, upon the whole
Mortgage and especially in the light of the pro-
vision on page 43, the phrase was not used with

844 the broadest possible meaning it might have if standing alone, and with the meaning the expert thought it should have for bookkeeping purposes and that it was not intended to include such interest charges, the case is disposed of. That this construction is right, I think clearly follows from the decision of the Circuit Court.

In the opinion of the Circuit Court, it is said:

> "Construing the instrument as a whole I am not satisfied that it was the intent of the parties that obligations incurred to the Railway Company (or to its assignees or sub-
845 lessee) for current operating debt incurred in the ordinary course of bsusiness should be held for or assigned to the trustee under the provisions of the clause relied upon on page 43 of the printed copy of the Mortgage."

The provision referred to on page 43 of the Mortgage reads as follows:

> "All claims against Controlled Companies now held or hereafter acquired by the Railroad Company, shall be, and shall be held by the Railroad Company as security for the payment of the bonds hereby secured, and the Railroad Company shall at any time,
846 upon the written demand of the Trustee, assign such claims, or deliver the evidences thereof, to the Trustee."

This provision of the Mortgage, then, read in the light of the whole instrument, is not to be taken to include literally "all claims against Controlled Companies," but is subject to the provision on page 34 with respect to "current operating debt incurred in the ordinary course of business," the claim for which may be held free from any lien acquired or which could be acquired under the Mortgage. That is to say, the pro-

vision on page 43 is subject to an exception and 847
really means that all claims against Controlled Companies are to be held for the benefit of the Trustee, except those which represent current operating debt of the companies incurred in the ordinary course of business. The Mortgage then contemplates two classes of claims that might be held by the Railroad Company against Controlled Companies, those for current operating debt referred to on page 34 and those that are to be held for the benefit of the trustee and transferred to it upon demand under the provision on page 43. Claims against Controlled Companies 848
on advances made for construction purposes are within the provision on page 43 and when such claims are reduced to the form of interest bearing promissory notes and the notes are held by the Trustee, it is entitled to the interest as well as the principal even before default under the Mortgage. This was held by the Circuit Court in disallowing the claim on open account upon my first report (Report of May 4, 1909, pages 3 to 10). The defendant under date of April 30th, 1907, had made its note for $6,491,967.44 bearing interest at four per cent. per annum, to cover its entire indebtedness on construction account. 849
The note was held by the Trustee under the provision on page 43 of the Mortgage. The New York City Railway Company claimed that until default under the Mortgage, it was entitled to the interest and charged the same against the defendant on the open account. It was held that the interest ran with the note and belonged to the trustee and as the amount charged by the New York City Railway Company and its Receivers exceeded the balance due, the claim on open account was disallowed. The defendant's notes given for construction purposes and upon

850 which interest was charged on the general account now under consideration, down to April 30th, 1907, were taken up by and merged in this large note just referred to (S. M., 125). One of the notes thus taken up was for $6,055,468.98, made on July 1st, 1901, to the order of the Third Avenue Railroad Company. It is now contended by the defense that the interest on these notes as well as the notes themselves, belonged in equity to the Trustee of the Mortgage and that the interest was improperly charged by the New York City Company. This particular contention, however, is disposed
851 of in the opinion of the Circuit Court where one of the reasons given why the Trustee was not the equitable owner of the note itself was that "no written demand was made by the Trustee until after the property passed out of the control of the sub-lessee * * *." No demand was made for the construction notes in question nor did the Trustee obtain them until merged in the large note of April 30th, 1907, as above stated, and it follows, from the opinion of the Court above referred to, that the charges for interest prior to that date could not be made by the Trustee. The notes ran to the Third Avenue Railroad Company or to the
852 Metropolitan Company, its lessee, and the New York City Company claimed that, as sub-lessee, it was entitled to collect the whole income from the Third Avenue system and claimed the interest on these notes as part of that income. Assuming that this claim is well founded and that, as against the Third Avenue and Metropolitan Companies, it was right for the New York City Company to make the charge for interest, in the absence of any demand by the Trustee, it does not follow that the charge was for a current operating debt incurred in the ordinary course of business. The fact that no demand was made by the Trustee may well de-

termine the right of the New York City Company 853
to assert the claim, but it certainly does not determine the nature of the claim and that remains to be considered. The Court has held that current operating debts are wholly independent of the provision on page 43 of the Mortgage and it necessarily follows that no claim which could have been reduced to possession by the Trustee under that provision can possibly be a current operating debt as understood in this Mortgage. That these construction notes could have been obtained by the Trustee had a timely demand been made and that had they been obtained the Trustee would have 854
been entitled to the interest, has already been determined by the Court, as above stated, in sustaining the Trustee's position as holder of the large note into which they were merged and in holding that the interest ran to the Trustee as such holder. Upon the law of the case as it now stands, then, and upon the terms of the Mortgage as construed by the Court, it is clear that the charges for interest on construction notes cannot be sustained as part of the defendant's "current operating debt incurred in the ordinary course of business" within the meaning of those words as used in the 855
Mortgage and we are not concerned with their meaning in any other place or under any other conditions. The total amount of such interest charged on the general open account up to April 30th, 1907, was $980,254.92 (S. M., 122). The balance shown on the account to be due on that day was $893,433.30 and it follows that no part of the claim represented by the note for $893,433.30, given to pay that balance, includes "current operating debt incurred in the ordinary course of business" and that the claim on rehearing must be disallowed and dismissed on the merits.

856 For the reasons above stated, I do find and report the following as my formal

CONCLUSIONS.

First.—That the New York City Railway Company maintained upon its books a general open account with the defendant Company and that on April 30th, 1907, the said account showed a balance due from the defendant Company of $893,433.30.

Second.—That the promissory note made by the defendant Company to the order of the New York
857 City Railway Company in the sum of $893,433.30 and dated April 30th, 1907, was given in payment of said balance shown to be due upon the books of the New York City Railway Company.

Third.—That upon said general open account the defendant Company was charged (among other things) with interest upon promissory notes made by it and given to cover advances made for construction purposes.

Fourth.—That interest due upon construction notes of "Controlled Companies" is no part of
858 their "current operating debt incurred in the ordinary course of business" within the meaning of those words as used in the "First Consolidated Mortgage" of the Third Avenue Railroad Company.

Fifth.—That the total amount of interest charged against the defendant on its notes given for construction purposes, up to April 30th, 1907, and included in said open account which showed a balance due on said date of $893,433.30 was largely in excess of said balance, namely, $980,254.92.

Sixth.—That no part of the claim represented

by the defendant's promissory note for 859
$893,433.30 includes "current operating debt incurred in the ordinary course of business" and that the claim on rehearing should be disallowed and dismissed on the merits.

I submit herewith as part of this report the minutes of all testimony taken on rehearing, consisting of 198 typewritten pages, and all exhibits received in the record and therein referred to, being Claimant's Exhibits D, E, F, G, H, I and J, of November 13th, 1909, and Claimant's Exhibit K of November 4th, 1909.

Dated New York, November 29th, 1909. 860

Respectfully submitted,
EDWARDS H. CHILDS,
Special Master.

(Endorsed)—"Filed November 29, 1909."

The Exhibits referred to in the foregoing Master's Report appear in the Exhibit Book.

861

862 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
863 *Defendant.*

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company.

No. 172.

PLEASE TAKE NOTICE that the annexed is a copy of exceptions of the above named claimant to the
864 Report of Hon. Edwards H. Childs, Special Master herein, this day duly filed herein in the office of the Clerk of the United States Circuit Court for the Southern District of New York.

Dated New York, December 3d, 1909.

DEXTER, OSBORN & FLEMING,
Solicitors for Wm. W. Ladd, as Receiver of New York City Railway Company, Claimant,
71 Broadway,
Borough of Manhattan,
New York City.

To: 865

MESSRS. MERRILL & ROGERS,
Solicitors for Receiver of Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company,
128 Broadway,
New York City.

MESSRS. BOWERS & SANDS,
Solicitors for Central Trust Co.,
31 Nassau Street,
N. Y. City.

MESSRS. EVARTS, CHOATE & SHERMAN,
Solicitors for Receiver of Third Avenue Railroad Company, 863
60 Wall Street,
N. Y. City.

(Endorsed)—"Filed December 3, 1909."

867

868 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
869 *Defendant.*

Exceptions to Master's Report on Rehearing.

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company.

No. 172.

The above named claimant, William W. Ladd as Receiver of the New York City Railway Company,
770 hereby excepts to the report of Edwards H. Childs, Esq., as Special Master herein, made in the above entitled matter November 29, 1909, and filed on that day in the office of the Clerk of this Court, in the following particulars:

First Exception.—The claimant excepts to the ruling of the Special Master by which he entertained the motion to dismiss while claimant's proof was in progress, by which he refused to allow claimant to proceed further with said proof, and by which he dismissed claimant's claim on the merits.

Second Exception.—The claimant excepts to 871
the Special Master's Conclusion numbered Fourth:

> "*Fourth.*—That interest due upon construction notes of 'Controlled Companies' is not part of their 'current operating debt incurred in the ordinary course of business' within the meaning of those words as used in the 'First Consolidated Mortgage' of the Third Avenue Railroad Company,"

that said Conclusion is against law, because interest on these construction notes of the defendant company is part of its "current operating debt 872
incurred in the ordinary course of business" within the meaning of these words as used in the "First Consolidated Mortgage" of the Third Avenue Railroad Company; and further because said construction notes were the property of the Third Avenue Railroad Company and of the Metropolitan Street Railway Company, and that interest thereon was income of said companies to which the New York City Railway Company was entitled under the lease from the Third Avenue Railroad Company to the Metropolitan Street Railway Company, and the lease from the Metropolitan Street Railway Company to the New 873
York City Railway Company.

Third Exception.—The claimant excepts to the Special Master's Conclusion numbered Sixth:

> "Sixth.—That no part of the claim represented by the defendant's promissory note for $893,433.30 includes 'current operating debt incurred in the ordinary course of business' and that the claim on rehearing should be disallowed and dismissed on the merits,"

that said Conclusion is against law because a

874 large portion of the claim represented by the defendant's promissory note for $893,433.30 includes "current operating debt incurred in the ordinary course of business;" that the interest therein included is part of the income of the Third Avenue Railroad Company and of the Metropolitan Street Railway Company, to which income the claimant is entitled, as specified in the Second Exception herein; and because the Special Master should have allowed said claim on rehearing on the merits.

Dated New York, December 3d, 1909.

875 DEXTER, OSBORN & FLEMING,
Solicitors for William W. Ladd, as Receiver of the New York City Railway Company,
71 Broadway,
Borough of Manhattan,
City of New York.

(Endorsed)—"Filed December 3, 1909."

876

UNITED STATES CIRCUIT COURT, 877

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendant. 878

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company.

Notice of Hearing of Exceptions.

No. 172.

SIRS: Please take notice that the exceptions of the above named claimant to the Report of Hon. Edwards H. Childs, the Special Master herein, 879 will be brought on for hearing before Hon. E. Henry Lacombe, Circuit Court Judge, in Room 124 of the Federal Court House Building on the 10th day of December, 1910, at 3:30 in the after-

880 noon, or as soon thereafter as counsel can be heard.

December 3rd, 1909.

DEXTER, OSBORN & FLEMING,
Solicitors for Wm. W. Ladd, as Receiver of New York City Railway Company,
71 Broadway,
Borough of Manhattan,
New York City.

To:

MESSRS. MERRILL & ROGERS,
881 *Solicitors for Receiver of Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company,*
128 Broadway,
New York City.

MESSRS. BOWERS & SANDS,
Solicitors for Central Trust Co.,
31 Nassau Street, City.

MESSRS. EVARTS, CHOATE & SHERMAN,
Solicitors for Receiver of Third Avenue Railroad Company,
60 Wall Street,
882 N. Y. City.

(Endorsed)—"Filed Dec. 3, 1909."

UNITED STATES CIRCUIT COURT, 883

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY.

IN THE MATTER 884

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company.

LACOMBE, *C. J.:*

The argument has gone somewhat into the questions argued upon exceptions to the original report, but I see no reason to modify the conclusions 885
expressed in the memorandum filed upon disposing of them. As was then pointed out, the situation is complicated, intricate and difficult, and the fundamental documents not easy of construction. It is most important that an authoritative exposition of these documents should be secured before the receivers of all these roads embark in an interminable controversy as to items of charge and credit, with all the loss of time and money therein involved. The Master has reached a conclusion which, if it be sound, will finally dispose of this claim—and presumably of similar ones against

886 other roads. He has presented the argument in support of his conclusions clearly and tersely, and I concur in order that the questions of law presented, which would not apparently be modified by proofs of what was actually disbursed for physical operation and repairs, may be finally determined now instead of waiting till the funds of the various roads, which should be used to pay debts, may be largely dissipated in a long accounting. This concurrence, however, is not without considerable doubt, especially as to any items of charge arising subsequent to September 24, 1907. When the
887 property of the New York City Railway Company went into the hands of receivers and its operation thereof, and indeed its activities generally, ceased, the "open account" between it and the Forty-second Street Company came to an end, except for possible items of interest subsequently charged on amounts then due. When the receivers began the operation of the property in their hands as court officers and thus came into relations with the Forty-second Street Company a new open account began. When the receivers furnished power or supplies or demanded apportionment of cash fares received on lower Broadway, they did so not as
888 mere successors to the claims of the company whose property they took, but as independent operators of its road. If in the first three months of their receivership they sold electric power to the Forty-second Street Company to the amount of $20,000, and if during the same time the Forty-second Street Company collected cash fares while using tracks in the receivers' possession, for the use of which they became obligated to pay $5,000, it is difficult to understand on what theory they can get rid of the obligations to account to receivers for those sums on the ground that they had a claim against the New York City Company when

the latter ceased operations on September 24. To allow such a set-off would be substantially to give the Forty-second Street Company's claim against the New York City Company a preference over the claims of other general creditors to which it would seem not to be entitled. The exceptions are all overruled and the report confirmed. Lest there be any doubt as to what will come upon appeal the decretal order may contain the provisions of the earlier one entered on the first report. 889

(Endorsed)—"Filed December 17, 1909." 890

891

892 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
893 *Defendant.*

Decree of December 29, 1909.

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company.

No. 172.

Now on this 10th day of December, 1909, this cause came on for a final hearing on the report on
894 rehearing of Edwards H. Childs, Special Master, said report being dated November 29th, 1909; and on the exceptions thereto filed on December 3d, 1909, by the claimant, William W. Ladd, as Receiver of the New York City Railway Company; and on the report of Edwards H. Childs, Special Master, on the first hearing, which report is dated May 1st, 1909; and on the exceptions to said first report filed on May 7th, 1909, by the claimant, William W. Ladd, as Receiver of the New York City Railway Company; and on the decretal order made by this Court on the said first report and exceptions,

overruling certain of said exceptions and confirming others, as more fully appears from the adjudicating provision of said order which is incorporated in the first adjudicating paragraph hereof, which decretal order was filed with the Clerk of this Court on June 15th, 1909. 895

Whereupon, on reading and filing the papers aforesaid, together with proof of due service of the notice of hearing on said exceptions on Messrs. Merrill & Rogers, solicitors for the Receiver of the defendant company, on Messrs. Evarts, Choate & Sherman, solicitors for the Receiver of the Third Avenue Railroad Company, on Messrs. Bowers & Sands, solicitors for the Central Trust Company and the defendant herein, and on Messrs. Kellogg & Rose, solicitors for the Barber Asphalt Paving Company, the complainant herein. 896

And after hearing Matthew C. Fleming, Esq., of counsel for the Receiver of the New York City Railway Company, in support of the exceptions, John M. Bowers, Esq., of counsel for the Central Trust Company, Herbert J. Bickford, Esq., of counsel for the Receiver of the Third Avenue Railroad, and Alfred H. Holbrook, Esq., of counsel for the Receiver of the defendant, in support of the Master's Report; and the Court being fully advised in the premises, it is, as provided in the first decretal order, 897

Ordered, Adjudged and Decreed, that the claimant's exceptions to the Master's first report, numbered first to sixth, inclusive, which exceptions were filed on May 7th, 1909, be, and the same hereby are, overruled, that the Special Master's conclusions in his first report, dated May 1st, 1909, numbered first to tenth, inclusive, be, and the same hereby are, confirmed, and that the claimant's exception numbered seventh, which ex-

898 cepts to the Special Master's conclusion numbered eleventh of the first report, be and the same hereby is sustained. And it is further

ORDERED, ADJUDGED AND DECREED, that the claimant's exceptions numbered first, second and third to the Master's Report on rehearing, which exceptions were filed on December 3d, 1909, be and the same hereby are overruled, and the Report of the Master on rehearing, including his conclusions thereon, numbered first, second, third, fourth, fifth and sixth, be and the same hereby is sustained and confirmed. And it is further

899 ORDERED, ADJUDGED AND DECREED, that the said claim of the Receiver of the New York City Railway Company, known as number one hundred and seventy-two, and filed with the Clerk of this Court on May 26th, 1909, be and the same hereby is disallowed and dismissed on the merits.

E. HENRY LACOMBE,
U. S. C. J.

(Endorsed)—"Filed December 29, 1909."

900

UNITED STATES CIRCUIT COURT, 901

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainants,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendants.

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, No. 172.

Citation. 902

UNITED STATES OF AMERICA, SS.:

903

To Frederick W. Whitridge, Receiver of the defendant Company and Receiver of the Third Avenue Railway Company; Central Trust Company of New York, Barber Asphalt Paving Company, William J. Haley, Administrator:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit at the City of New York on the 7th day of February, 1910, pursuant to an appeal on the part of the claimant above named, William W. Ladd, Receiver of the

904 New York City Railway Company, filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York in the above suit, to show cause, if any there be, why the orders and decrees of the Circuit Court of the United States in said appeal mentioned should not be reversed, modified or corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of New York in the Southern District of New York on the 11th day of January, 1910.

E. HENRY LACOMBE,
905 *United States Circuit Judge.*

(Endorsed)—"Copy received" Jany. 13, 1910.

KELLOGG & ROSE,
SELDEN BACON,
BOWERS & SANDS,
EVARTS, CHOATE & SHERMAN,
MERRILL & ROGERS.

Filed January 14, 1910.

906

UNITED STATES CIRCUIT COURT, 907

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainants,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendants.

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, No. 172.

Claim of Appeal. 908

The above-named claimant, William W. Ladd, Receiver of the New York City Railway Company, 909 conceiving himself aggrieved by the decrees made and entered on the 15th day of June, 1909, and the 29th day of December, 1909, in the above-entitled cause, does hereby appeal from said orders and decrees to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said orders were made, duly authenticated, may be sent to the

910 United States Circuit Court of Appeals for the Second Circuit.

Dated New York, January 11th, 1910.

DEXTER, OSBORN & FLEMING,
Solicitors for Claimant,
71 Broadway,
Borough of Manhattan,
City of New York.

The foregoing claim of appeal is allowed.

Dated New York, January 11th, 1910.

911

E. HENRY LACOMBE,
United States Circuit Judge.

(Endorsed)—"Copy received" Jany 13, 1910.

KELLOGG & ROSE,
SELDEN BACON,
BOWERS & SANDS,
EVARTS, CHOATE & SHERMAN,
MERRILL & ROGERS.

Filed January 14, 1910.

912

UNITED STATES CIRCUIT COURT, 913

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

against

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendants.

IN THE MATTER

of

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, No. 172.

Assignment of Errors. 914

And now comes the claimant, William W. Ladd as Receiver of the New York City Railway Company, and respectfully makes the following assignment of errors in the above entitled cause to be relied upon by him in his appeal from the decrees made and entered in the above entitled cause on the 15th day of June, 1909, and the 29th day of December, 1909. 915

First.—In both decrees the Court erred in not sustaining the First Exception taken by the claimant to the first report made herein by Edwards H. Childs, Special Master, dated May 1, 1909, and filed herein on May 4, 1909, whereby the claimant

916 excepted to the First Conclusion of the Special Master on the ground that said conclusion is against law, because the note of the defendant for $6,491,967.44 therein mentioned was the property of the Third Avenue Railroad Company, interest thereon was income of said company to which it was entitled under its mortgage to the Morton Trust Company, and the New York City Railway Company was entitled to this income under said mortgage from the Third Avenue Railroad Company to the Morton Trust Company, the lease from the Third Avenue Railroad Company to the
917 Metropolitan Street Railway Company, and the lease from the Metropolitan Street Railway Company to the New York City Railway Company.

Second.—In both decrees the Court erred in not sustaining the Second Exception taken by the claimant to said first report of said Special Master, whereby the claimant excepted to the Second Conclusion of said Master on the ground that said conclusion is against law, because said Receivers and said claimant upon their appointment succeeded to the right of said New York City Railway Company to such interest, as is set forth in the
918 above First Assignment of Error.

Third.—In both decrees the Court erred in not sustaining the Third Exception taken by the claimant to said first report of said Special Master, whereby the claimant excepted to the Fourth Conclusion of the Special Master on the ground that said conclusion is against law, because the Special Master and the Court below should have allowed said claim on open account.

Fourth.—In both decrees the Court erred in not sustaining the Fourth Exception taken by the claimant to said first report of said Special Mas-

ter, whereby the claimant excepted to the Sixth Conclusion of the Special Master on the ground that said conclusion is against law, because it is contrary to the evidence. 919

Fifth.—In both decrees the Court erred in not sustaining the Fifth Exception taken by the claimant to said first report made herein by said Special Master, whereby the claimant excepted to so much of the Seventh Conclusion of the Special Master as found that the claimant had not sustained the burden of proof upon the whole case as finally submitted on the ground that said conclusion is against law, because it is contrary to the evidence submitted to said Special Master. 920

Sixth.—In both decrees the Court erred in not sustaining the Sixth Exception taken by the claimant to said first report made herein by said Special Master, whereby the claimant excepted to the Eighth Conclusion of the Special Master on the ground that said conclusion is against law, because it is contrary to the evidence submitted to the Special Master, the evidence so submitted showing that the claim on the said promissory note should be allowed. 921

Seventh.—In both decrees the Court erred in confirming the conclusions of said Special Master in said first report, numbered First to Tenth, inclusive.

Eighth.—In the decree made herein on the 29th day of December, 1909, the Court erred in not sustaining the Second Exception taken by the complainant to the report on rehearing made herein by said Special Master dated and filed herein on November 29, 1909, whereby the claimant ex-

922 cepted to the conclusion of said Special Master numbered Fourth on the ground that said conclusion is against law, because interest on the construction notes of the defendant company therein specified was a part of its "current operating debt incurred in the ordinary course of business" within the meaning of these words as used in the "First Consolidated Mortgage" of The Third Avenue Railroad Company; and further because said construction notes of the defendant company are the property of the Third Avenue Railroad Company and of the Metropolitan Street
923 Railway Company, and interest thereon was income of said companies to which they were entitled under said mortgage, and to which the New York City Railway Company is entitled under the above mortgage, under the lease from the Third Avenue Railroad Company to the Metropolitan Street Railway Company, and under the lease from the Metropolitan Street Railway Company to the New York City Railway Company.

Ninth.—In the decree made herein on the 29th day of December, 1909, the Court erred in not sustaining the Third Exception taken by the com-
924 plainant to the report on rehearing made herein by said Special Master dated and filed herein on November 29, 1909, whereby the claimant excepted to the conclusion of said Special Master numbered Sixth on the ground that said conclusion is against law, because the claim represented by defendant's promissory note for $893,433.30 consists of "current operation debt incurred in the ordinary course of business;" and further because the interest therein included is part of the income of the Third Avenue Railroad Company and of the Metropolitan Street Railway Company to which they were entitled, as specified in the

Eighth

~~Ninth~~ Assignment of error, under the mortgage and lease above mentioned, that it was part of the income of the Metropolitan Street Railway Company to which it was entitled under the lease of the Third Avenue Railroad Company to the Metropolitan Street Railway Company, and that the claimant is entitled to said income under said mortgage and lease above mentioned, under the lease from the Metropolitan Street Railway Company to the New York City Railway Company, and by virtue of his appointment as Receiver of said New York City Railway Company, and further because the Special Master should have allowed said claim on rehearing on the merits. 925 926

Tenth.—In the decree made herein on the 29th day of December, 1909, the Court erred in confirming the conclusions of said Special Master in said report on rehearing numbered First to Sixth, inclusive.

Wherefore the claimant prays that the decrees of June 15, 1909, and December 29, 1909, be reversed, and that said claim be allowed.

DEXTER, OSBORN & FLEMING,
Solicitor for Claimant,
71 Broadway,
Borough of Manhattan,
City of New York. 927

(Endorsed)—"Copy received" Jany. 13, 1910.

Kellogg & Rose,
Selden Bacon,
Bowers & Sands,
Evarts, Choate & Sherman,
Merrill & Rogers.

Filed January 14, 1910.

928 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to three hundred and ten, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled The Barber Asphalt Paving Company, Complainant, against The Forty-second Street, Manhattanville and St. Nicholas Avenue
929 Railway Company, *et al.*, Defendants—In the Matter of the Claim of William W. Ladd, as Receiver of the New York City Railway Company, No. 172, as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this day of January, in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the said United States the One Hundred and
930 Thirty-fourth.

JOHN A. SHIELDS,
Clerk.

I hereby certify that the fee for certifying the above entitled cause amounted to Dollars.

JOHN A. SHIELDS,
Clerk.

UNITED STATES CIRCUIT COURT, 931

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

AGAINST

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendant. 932

IN THE MATTER OF

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, Claim No. 172.

FREDERICK W. WHITRIDGE, as Receiver for The Third Avenue Railroad Company, a party who has intervened in this cause, conceiving himself aggrieved by the orders and decrees made and entered herein on the 15th day of June, 1909, and the 29th day of December, 1909, does hereby appeal from said orders and decrees to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said orders were made, duly authenticated, may be sent 933

934 to the United States Circuit Court of Appeals, for the Second Circuit.

Dated New York, January 24th, 1910.

EVARTS, CHOATE & SHERMAN,
Solicitors for Frederick W. Whitridge, Receiver of The Third Avenue Railroad Company,
60 Wall Street,
Borough of Manhattan,
New York, N. Y.

The foregoing claim of appeal is hereby allowed.

935 Dated New York, January 24th, 1910.

E. HENRY LACOMBE,
United States Circuit Judge.

Due and timely service of a copy of the foregoing Claim of Appeal is admitted January 25, 1910.

DEXTER, OSBORN & FLEMING,
Solicitors for William L. Ladd as Receivers for the New York City Railway Co.

KELLOGG & ROSE,
Solicitors for Barber Asphalt Paving Company, Complainant.

936 SELDEN BACON,
Solicitor for William J. Haley, as Admr., &c.

(Endorsed)—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 26, 1910.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 937

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

AGAINST

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendant.

IN THE MATTER

OF

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, Claim No. 172.

Assignment of Errors. 938

And now comes Frederick W. Whitridge, as Receiver of The Third Avenue Railroad Company, a party who has intervened in this cause, and makes 939
the following assignment of errors in the above-entitled cause to be relied upon by him in his appeal from the decrees made and entered in the above-entitled cause on the 15th day of June, 1909, and the 29th day of December, 1909.

FIRST.—In both decrees the Court erred in its order of June 15th, 1909, in sustaining the exception of William W. Ladd as Receiver of New York City Railway Company, the claimant, numbered seventh, which excepts to the Special Master's Conclusion numbered eleventh, contained in his report

940 dated May 1st, 1909, and further in sustaining in its order of December 29th, 1909, the same exception of said Receiver claimant to said Conclusion numbered eleventh in said Special Master's Report dated May 1st, 1909, in which conclusion numbered eleventh said Special Master finds and concludes that if the conclusion that the claims mentioned in said report should be disallowed is error, and if said claims are valid as a matter of law, they are claims against one of the Controlled Companies "referred to in the First Consolidated Mortgage of The Third Avenue Railroad Company, above mentioned, and as such are impressed with a trust
941 in favor of the Central Trust Company as Trustee, and should be transferred to said company by the claimant."

WHEREFORE, the claimant prays that the decrees of June 15th, 1909, and December 29th, 1909, be reversed in this respect, and that said conclusion numbered eleventh in said report be sustained and confirmed.

Dated New York, January 24th, 1910.

EVARTS, CHOATE & SHERMAN,
Solicitors for Receiver of The Third Avenue Railroad Company,
942 60 Wall Street,
Borough of Manhattan,
New York, N. Y.

(Endorsed)—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 24, 1910.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 943

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

AGAINST

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendant. 944

IN THE MATTER

OF

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, Claim No. 172.

United States of America, ss.:

TO WILLIAM W. LADD, AS RECEIVER OF THE NEW YORK CITY RAILWAY COMPANY, BARBER ASPHALT PAVING COMPANY AND WILLIAM J. HALEY, AS ADMINISTRATOR, ETC.: 945

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Second Circuit, at the City of New York, on the 7th day of February, 1910, pursuant to an appeal on the part of Frederick W. Whitridge as Receiver of The Third Avenue Railroad Company, filed in the office of the Clerk of the Circuit Court of the United States, for the Southern District of New York, in the above suit, to

946 show cause, if any there may be, why the orders and decrees of the Circuit Court of the United States in said appeal mentioned should not be reversed, modified or corrected in the manner specified in said appeal, but otherwise approved and confirmed, and speedy justice should not be done in that behalf.

GIVEN under my hand at the City of New York, in the Southern District of New York, on the 24th day of January, 1910.

E. HENRY LACOMBE,
United States Circuit Judge.

947 Due and timely service of copies of the foregoing citation and allowance of appeal is admitted January 25, 1910.

DEXTER, OSBORN & FLEMING,
Solicitors for William W. Ladd as Receiver of New York City Railway Co.

KELLOGG & ROSS,
Solicitors for Barber Asphalt Paving Company, Complainant.

SELDEN BACON,
Solicitor for William J. Haley, as Admin., Etc.

948 (Endorsed)—U. S. Circuit Court, Southern District of New York.—The Barber Asphalt Paving Company, Complainant, against The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, Defendants.—In the Matter of the Claim of William W. Ladd, as Receiver of the New York City Railway Company, Claim No. 172.—Original Citation.—Evarts, Choate & Sherman, Solicitors for Receiver, 60 Wall Street, Borough of Manhattan, New York City, N. Y.—U. S. Circuit Court, Southern District, N. Y.—Filed Jan. 26, 1910.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 949

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

AGAINST

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY, 950
Defendant.

IN THE MATTER

OF

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, Claim No. 172.

CENTRAL TRUST COMPANY OF NEW YORK, as 951 Trustee of the First Consolidated Mortgage of The Third Avenue Railroad Company, dated May 15th, 1900, which has intervened in this cause, conceiving itself aggrieved by the orders and decrees made and entered herein on the 15th day of June, 1909, and the 29th day of December, 1909, does hereby appeal from said orders and decrees to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a

952 transcript of the records, proceedings and papers upon which said orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Second Circuit.

Dated, New York, January 24th, 1910.

BOWERS & SANDS,
Solicitors for Central Trust Company of New York, as Trustee,
31 Nassau Street,
Borough of Manhattan,
New York, N. Y.

953 The foregoing claim of appeal is hereby allowed.
Dated, New York, January 24th, 1910.

E. HENRY LACOMBE,
United States Circuit Judge.

Due and timely service of copies of the foregoing claim of appeal and allowance of appeal is admitted January 25, 1910.

DEXTER, OSBORN & FLEMING,
Solicitors for William W. Ladd, as Receiver of New York City Railway Co.

KELLOGG & ROSE,
954 Solictor for Barber Asphalt Paving Company, Complainant.

SELDEN BACON,
Solicitor for William J. Haley, as Admr., &c.

(Endorsed)—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 26, 1910.—John A. Shields, Clerk.

955

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

AGAINST

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendant.

IN THE MATTER

OF

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, Claim No. 172.

Assignment of Errors. 956

And now comes the CENTRAL TRUST COMPANY OF NEW YORK, which is the substituted trustee under the First Consolidated Mortgage of The Third Avenue Railroad Company, bearing date May 15th, 1900, and which has intervened as a party in this cause, and respectfully makes the following assignment of errors in the above-entitled cause to be relied upon by it in its appeal from the decrees made and entered in the above-entitled cause on the 15th day of June, 1909, and on the 29th day of December, 1909. 957

FIRST.—In both decrees the Court erred in its order of June 15th, 1909, in sustaining the excep-

958 tion of William W. Ladd, as Receiver of New York City Railway Company, the claimant, numbered seventh, which excepts to the Special Master's Conclusion numbered eleventh, contained in his report dated May 1st, 1909, and further in sustaining in its order of December 29th, 1909, the same exception of said Receiver claimant to said Conclusion numbered eleventh in said Special Master's Report dated May 1st, 1909, in which Conclusion numbered eleventh said Special Master finds and concludes that if the conclusion that the claims mentioned in said report should be disallowed is error, and if said claims are valid as a
959 matter of law, they are claims against one of the Controlled Companies "referred to in the First Consolidated Mortgage of The Third Avenue Railroad Company, above mentioned, and as such are impressed with a trust in favor of the Central Trust Company, as Trustee, and should be transferred to said company by the claimant."

WHEREFORE, the claimant prays that the decrees of June 15th, 1909, and December 29th, 1909, be reversed in this respect, and that said Conclusion numbered eleventh in said report be sustained and confirmed.

960 Dated, New York, January 24th, 1910.

BOWERS & SANDS,
Solicitors for Central Trust Company of New York, as Trustee,
31 Nassau Street,
Borough of Manhattan,
New York, N. Y.

(Endorsed)—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 24, 1910.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 961

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

AGAINST

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendant. 962

IN THE MATTER
OF
The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, Claim No. 172.

United States of America, ss.:

TO WILLIAM W. LADD, AS RECEIVER OF THE NEW YORK CITY RAILWAY COMPANY, BARBER ASPHALT PAVING COMPANY AND WILLIAM J. HALEY, AS ADMINISTRATOR, ETC.: 963

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the second Circuit, at the City of New York, on the 7th day of February, 1910, pursuant to an appeal on the part of the CENTRAL TRUST COMPANY OF NEW YORK, filed in the office of the Clerk of the Circuit Court of the United States, for the Southern District of New York, in the above

964 suit, to show cause, if any there may be, why the orders and decrees of the Circuit Court of the United States in said appeal mentioned should not be reversed, modified or corrected in the manner specified in said appeal, but otherwise approved and confirmed, and speedy justice should not be done in that behalf.

GIVEN under my hand at the City of New York, in the Southern District of New York, on the 24th day of January, 1910.

E. HENRY LACOMBE,
United States Circuit Judge.

965 Due and timely service of a copy of the foregoing citation is admitted January 25, 1910.

DEXTER, OSBORN & FLEMING,
Solicitors for William W. Ladd as Receiver of New York City Railway Co.

KELLOGG & ROSE,
Solicitors for Barber Asphalt Paving Company, Complainant.

SELDEN BACON,
Solicitor for William J. Haley, as Admr., Etc.

966 (Endorsed)—U. S. Circuit Court, Southern District of New York.—The Barber Asphalt Paving Company, Complainant, Against, The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, Defendants.—In the Matter of the Claim of William W. Ladd, as Receiver of the New York City Railway Company, Claim No. 172.—Original Citation.—Bowers & Sands, Solicitors for Claimant, 31 Nassau Street, Borough of Manhattan, New York City, N. Y.—U. S. Circuit Court, Southern District, N. Y.—Filed Jan. 25, 1910.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT, 967

SOUTHERN DISTRICT OF NEW YORK.

BARBER ASPHALT PAVING COMPANY,
Complainant,

AGAINST

THE FORTY-SECOND STREET, MANHATTANVILLE & ST. NICHOLAS AVENUE RAILWAY COMPANY, 968
Defendant.

IN THE MATTER

OF

The Claim of WILLIAM W. LADD, as Receiver of New York City Railway Company, Claim No. 172.

969

DUE AND TIMELY SERVICE of a copy of the assignment of errors of Central Trust Company of New York and of the Assignment of Errors of Frederick W. Whitridge, as Receiver of The Third Avenue Railroad Company, on the appeal from the orders of June 15th, 1909, and December 29th, 1909, made as to the Master's first and second report of the

970 above-mentioned claim, is hereby admitted this 25th day of January, 1910.

DEXTER, OSBORN & FLEMING,
Solicitors for William W. Ladd, as Receiver of New York City Railway Company.

KELLOGG & ROSE,
Solicitors for Barber Asphalt Paving Company, Complainant.

SELDEN BACON,
Solicitor for William J. Haley, as Admr., Etc.

971 (Endorsed)—U. S. Circuit Court, Southern District of N. Y.—Filed Jan. 26, 1910.—John A. Shields, Clerk.

972

UNITED STATES CIRCUIT COURT, 973

SOUTHERN DISTRICT OF NEW YORK.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

AGAINST

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY,
Defendant. 974

IN THE MATTER
OF
The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company, Claim No. 172.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above appeals in the above-entitled proceeding, that the appeal on the part of the Central Trust Company of New York and the appeal on the part of Frederick W. Whitridge as Receiver of The Third Avenue Railroad Company be heard together with the appeal on the part of William W. Ladd as Receiver of the New York City Railway Company, and that the assignments of error, claims of appeal and citations of said Central Trust Company of New York and Frederick W. Whitridge as Receiver of The Third Avenue 975

976 Railroad Company respectively be printed together with the transcript of record upon the appeal on the part of William W. Ladd as Receiver of the New York City Railway Company, and that said transcript of record as so printed be the transcript of record for the three above mentioned appeals of William W. Ladd as Receiver, etc., Central Trust Company of New York and Frederick W. Whitridge as Receiver, etc., respectively.

Dated New York, January 26th, 1910.

BOWERS & SANDS,
Solicitors for Central Trust Company of New York.

977

EVARTS, CHOATE & SHERMAN,
Solicitors for Frederick W. Whitridge, as Receiver, etc.

DEXTER, OSBORN & FLEMING,
Solicitors for William W. Ladd, as Receiver, etc.

KELLOGG & ROSE,
Solicitors for Barber Asphalt Paving Company.

SELDEN BACON,
Solicitors for William J. Haley, as Administrator, etc.

978

(Endorsed)—U. S. Circuit Court, Southern District, N. Y.—Filed Jan. 26, 1910.—John A. Shields, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York,
ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, DO

HEREBY CERTIFY, that the foregoing pages, numbered from one to 18, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled The Barber Asphalt Paving Company, Complainant-Appellee, against The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, Defendants-Appellees, In the Matter of the Claim of William W. Ladd, as Receiver of New York City Railway Company, Claim No. 172; Frederick W. Whitridge, as Receiver for the Third Avenue Railroad Company, Appellant; Central Trust Company of New York, as Trustee, Appellant, as the same remain of record and on file in my office, and from stipulation hereto annexed. 979 980

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of January, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the said United States the one hundred and thirty-fourth.

JOHN A. SHIELDS,
Clerk.

981

982 UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

THE BARBER ASPHALT PAVING COMPANY,
Complainant,

AGAINST

THE FORTY-SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY
983 COMPANY,
Defendant.

IN THE MATTER

OF

The Claim of WILLIAM W. LADD, as Receiver of the New York City Railway Company. Claim No. 172.

IT IS HEREBY STIPULATED AND AGREED by and be-
984 tween the parties to the appeals in the above-entitled proceeding, that the appeal on the part of the Central Trust Company of New York and the appeal on the part of Frederick W. Whitridge, as Receiver of The Third Avenue Railroad Company, be heard together with the appeal on the part of William W. Ladd, as Receiver of the New York City Railway Company; and that the assignments of error, claims of appeal and citations of said Central Trust Company of New York and Frederick W. Whitridge, as Receiver of The Third Avenue Railroad Company, respectively, be printed, together with the transcript of record upon the ap-

peal on the part of William W. Ladd, as Receiver 985
of the New York City Railway Company, and that said transcript of record as so printed be the transcript of record for the three above-mentioned appeals of William W. Ladd, as Receiver, etc., Central Trust Company of New York and Frederick W. Whitridge, as Receiver, etc., respectively.

Dated New York, January 31st, 1910.

BOWERS & SANDS,
Solicitors for Central Trust Company of New York.

EVARTS, CHOATE & SHERMAN,
Solicitors for Frederick W. 986
Whitridge, as Receiver, etc.

DEXTER, OSBORN & FLEMING,
Solicitors for William W. Ladd, as Receiver, etc.

KELLOGG & ROSE,
Solicitors for Barber Asphalt Paving Company.

SELDEN & BACON,
Solicitors for William J. Haley, as Administrator, etc.

MERRILL & ROGERS,
Solicitors for Receiver of 42nd 987
Street, etc., Railway Company.

So ordered.

E. HENRY LACOMBE,
U. S. C. J.

(Endorsed)—U. S. Circuit Court of Appeals, for the Second Circuit.—The Barber Asphalt Paving Company, Complainant, against The Forty-second Street, Manhattanville & St. Nicholas Avenue Railway Company, Defendant.—

988 In the Matter of the Claim of William W. Ladd, as Receiver of the New York City Railway Company. Claim No. 172.—Stipulation. —Bowers & Sands, Solicitors for Central Trust Company of New York, 31 Nassau Street, Borough of Manhattan, New York City, N. Y.—United States Circuit Court of Appeals, Second Circuit.—Filed Jan. 31, 1910. —William Parkin, Clerk.

989

990